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31

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AND
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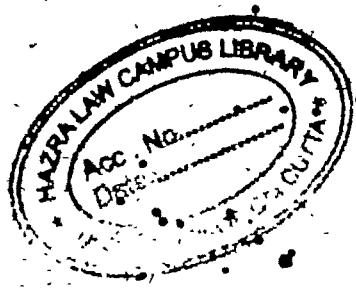

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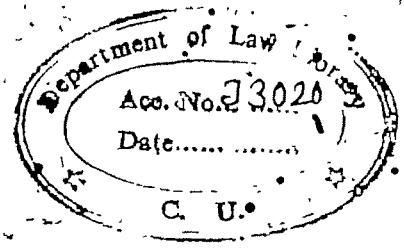

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1920.

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The Hon'ble Sir Asutosh Mookerjee, Kt. C.S.I. (*Acting Chief Justice*).

Puisne Judges :

The Hon'ble Sir John George Woodroffe, Kt. (*on leave*).
The Hon'ble Sir Asutosh Mookerjee, Kt. C.S.I.
" Sir Ernest Edward Fletcher, Kt.
" Sir Nalini Ranjan Chatterjea, Kt.
" W. Teunon.
" T. W. Richardson.
" Sir Asutosh Chaudhuri, Kt. (resigned on 11th June.)
" C. P. Beachcroft (*on leave*).
" H. Walmsley.
" W. E. Greaves.
" B. B. Newbould.
" Nawab Sir Syed Shamsul Huda, K.C.I.E.
" G. C. Rankin.
" C. C. Ghose.
" P. L. Buckland.
" E. B. H. Panton. (*Offg.*)
" A. H. Cuming. (*Offg.*)

Advocate General.

The Hon'ble Mr. T. C. P. Gibbons, K. C.

Standing Counsel.

Mr. S. R. Das.

Senior Government Pleader.

Babu Ram Charan Mitra, C.I.E.
Babu Dwarka Nath Chakravarty (*offg.*)

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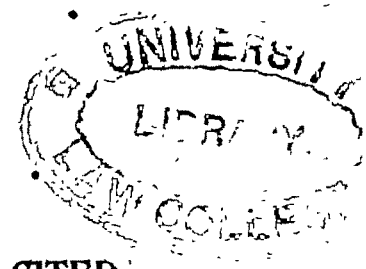

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Reports.

—‡‡—

APPELLATE CIVIL.

Before Mr. Justice Richardson and Sir Syed Shamsul Huda, Knight, Judge.

TELENDRAJIT RAJ KUMAR

v.

GUNENDRAJIT RAJ KUMAR AND OTHERS.*

CIVIL.

1919.

January, 10, 23.

Appeal—Appeal filed out of time—Provisional order admitting appeal—Respondent not objecting at hearing—Appellate Court, if can, suo motu, dismiss on the ground of limitation—Limitation Act (IX of 1908), Secs. 3, 5—Practice.

An appeal presented to the Court, was found to be out of time. The appellant filed an affidavit explaining the circumstances. Upon that the then District Judge ordered the appeal to be admitted "subject to objection at the hearing." The appeal was heard at length on the merits by the successor of the District Judge, the respondents raising no objection as to limitation. The District Judge held in favour of the appellant on the merits but dismissed the appeal, acting *suo motu* on the ground of limitation:

Held, that the order admitting the appeal was provisional in the sense that the respondents might at the hearing, take exception to it and show that it was wrong. Hence the District Judge was not at liberty to go behind the order, so long as the respondents did not chose to object to it.

That the District Judge should have decided the appeal in accordance with the opinion which he had formed on the merits.

The practice of admitting appeals "subject to objection at the hearing," is condemned: *Krishnasami* v. *Ramasami* (1) referred to.

* Appeal from Appellate Decree No. 2690 of 1916, against the decree of R. E. Jack Esq., District Judge of Nadia, dated the 31st August, 1916, affirming that of Babu Kali Kumar Sarkar, Subordinate Judge of Nadia, dated the 30th March, 1915.

(1) (1917) 27 C. L. J. 253; L. R. 45 I. A. 25; I. L. R. 41 Mad. 412.

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Telendrajit Guneendrajit.

Appeal by Defendant No. 2.

The material facts appear from the judgment.

Mr. C. R. Das and *Babu Baranashibaski Mukherjee* for the Appellant.

No one for the Respondents.

C. A. V.

January, 23.

The judgment of the Court was as follows:

This is a second appeal and the point arises in this way.

When the appeal to the lower appellate Court was presented it was found to be out of time. The appellant, who was the defendant No. 2 in the suit, filed an affidavit explaining the circumstances. Upon that the then District Judge ordered the appeal to be admitted "subject to objection at the hearing." The appeal came on for hearing before his successor and it appears that on behalf of the respondents, the plaintiffs, no objection was taken at the hearing to the order of admission. The appeal was heard at length on the merits and the District Judge in his judgment has discussed and pronounced upon the merits, his conclusion being that the decree of the trial Court in favour of the plaintiffs was erroneous and that the suit should have been dismissed. Having however come to that conclusion he seems to have noticed the order made when the appeal was admitted and acting *suo motu* he went on to deal with the question of limitation. On that question he found against the appellant and in the result he was, as he himself expresses it, "unfortunately" compelled to dismiss the appeal on the ground that it was time-barred.

From that decision the defendant No. 2 has appealed to this Court. The case has been argued on his behalf, but not, we regret to say, on behalf of the plaintiffs who have not entered appearance before us.

Now if we refer to section 3 of the Limitation Act, it lays down that every suit instituted or appeal presented after the prescribed period is to be "dismissed although limitation has not been set up as a defence." A duty is thus cast upon the Courts which in a proper case ought not to be neglected. But the rule so enacted is expressly made subject to the sections which follow and among those sections is section 5 under which on "sufficient cause" being shown, an appeal may be admitted out of time. The order made by the first District Judge was presumably made under that section. It was an order provisionally deciding the question of limitation in the appellant's favour. It was obtained by the appellant on the

strength of the affidavit filed by him and he was entitled to such benefit as he could derive from its terms. The words "subject to objection at the hearing" mean "subject to objection by the respondents" and the order was provisional in this sense that the respondents might at the hearing take exception to it and show that it was wrong. The District Judge was so far bound by the order, as an order made by his predecessor, that unless the respondents chose to object to it he was not at liberty to go behind it.

It follows that in our opinion the District Judge should have decided the appeal in accordance with the opinion which he had formed on the merits. On the present appeal it is open to us to make the decree which the District Judge should have made.

We may add that the practice of admitting appeals "subject to objection at the hearing" has now been condemned by the Privy Council: *Kirshnasami* v. *Ramasami* (1). The practice therefore, should cease.

The appeal is allowed. The decrees of the Courts below are set aside and the suit is dismissed. The appellant will pay his own costs of this appeal but is entitled to his costs in the Courts below.

A. T. M. *Appeal allowed.*

(1) (1917) 27 C. L. J. 253; L. R. 45 I. A. 25; I. L. R. 41 Mad. 412; 22 C. W. N 481.

Before Sir Asutosh Chaudhuri, Knight, Judge, and Mr. Justice Cuming.

ANNADA CHARAN MANDAL

v.

ATUL CHANDRA MALIK AND OTHERS.*

Hindu Law—Legal necessity—Alienation by Hindu widow—Letters of administration—Grant to Hindu Widow, effect of—Permission obtained for alienation—Fraudulent representation—Civil Court, if can declare the nullity of letters of administration.

A mortgagee from a Hindu widow of a portion of her husband's estate, who advanced money after the grant of leave to the widow, who had obtained letters of

* Appeal from Appellate Decree No. 707 of 1918, against the decree of H. C. Maitland, Esq., Additional District Judge of Howrah, dated the 14th January, 1918, reversing that of Babu Debendra Nath Pal, Subordinate Judge of Howrah, dated the 25th September, 1916.

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administration in respect of the estate, to mortgage, is not under any obligation to inquire into legal necessity for mortgage. To challenge such a transaction, it is to be shown that the person who got the sanction knew that the facts were false or that he was instrumental in getting the order from the Court upon false representation : *Kamikhya* v. *Hari Churn* (1) followed.

A civil Court has no jurisdiction to declare the order as to grant of letters of administration as null and void. The proper Court to set aside the letters of administration is the Probate Court.

Appeal by Defendant No. 2.

Suit for declaration of reversionary right and for a declaration that a mortgage executed by their grandmother was not operative against them.

The material facts appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Asiranjan Chatterjee* for the Appellant.

Babus Ram Chunder Majumdar and *Bijan Kumar Mukerjee* for the Respondents.

The judgment of the Court was as follows :

May, 12.

The plaintiffs instituted the suit for a declaration that they were the reversioners of the estate of one Gopal Chandra Shaw their maternal uncle, that a mortgage which had been executed by his widow Mokshodamoyee Dassi was not operative against them and that the properties covered thereby could not be sold in execution of the decree obtained by the mortgagee against her. They also applied for a temporary injunction restraining the sale and for a declaration that they were not affected by the mortgage deed or the decree or by the sale of the mortgage properties as directed by the said decree. It appears that the plaint was subsequently amended and an allegation was added that the mortgage-debt had been satisfied. It was also alleged by them that the lady had no legal necessity and therefore could not bind the estate in any manner. It is noticeable that there is nothing said in the plaint about this lady having obtained letters of administration to the estate of her husband. It is clear upon the evidence that citations were issued so far as the reversionary heirs were concerned and that some of them were present when the letters were granted. There is no question that the plaintiffs are the present reversionary heirs of Gopal Chandra Shaw.

The learned Subordinate Judge held that there was legal necessity for the loan contracted by the widow Mokhadamoyee, that she

(1) (1899) I. L. R. 26 Calc. 607.

applied for leave to mortgage the property after having obtained letters of administration and such leave was granted by the Court, that the reversioners at least some of them had knowledge of the application but did nothing. He held upon these facts that the plaintiffs "had knowledge of the legal necessity." As regards the allegation that the mortgage-debt due to the decree-holder had been satisfied he found that the documents relied upon by the plaintiffs were not genuine that the mortgage bond "had not been paid in part and not been satisfied from the income of the land in the mortgage suit" and therefore it stood good and valid. He therefore dismissed the suit.

On appeal the learned Additional District Judge has reversed that decision upon the following findings,—(1) that the mortgage in question was not for legal necessity and (2) that the defendant the mortgagee did not by *bona fide* enquiry satisfy himself that there was such necessity. It appears to us that he has entirely overlooked the question about this lady having obtained sanction of the Probate Court to mortgage the property. After such sanction the defendant No. 2 advanced money presumably relying upon the fiat of the Court. There is nothing to show nor has it been found that the transaction was collusive or fraudulent or that there was anything which tainted the transaction with fraud. It was not a case of advancing money having regard to the legal necessity of a Hindu widow but merely upon the leave granted by the Court which permitted her to mortgage the property. It is incorrect to suppose that having regard to the sanction given by a Probate Court a person had still to enquire as regards the necessity for such advance. If he relied upon *bona fide* the order and make the advance there is no onus upon him to go and make enquires about the truth of the allegations upon which the sanction was given. To challenge such a transaction it has to be shewn that the person who got the sanction knew that the facts were false or that he was instrumental in getting the order from the Court upon false representation. The learned Judge has however elaborately gone into the question of legal necessity and he has gone to the extent that even the earlier mortgage transaction in which the estate was concerned was not a good mortgage and he has not considered the case from the point of view we have above mentioned. We call his attention to *Kamikkya* v. *Hari Churn* (1).

Then as regards the question of payment of the mortgage debt he says this :—The accounts show that Mokhada paid off the money

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due to Annada the mortgagee. He says the learned Subordinate Judge had not sufficient ground for finding that the documents relied upon by the other side were fabrications. He doubted if there were sufficient grounds. Dealing with the accounts exhibit 11 and an abstract of that account exhibit 5 which purports to have been signed by the mortgagee he says, there is no express denial of the signature by Annada the mortgagee, but that Annada merely denied that he made the endorsement. He says that it is alleged that Annada was looking after the property of the widow and adds: "Taking it that he was looking after the property—I must say I think there is quite sufficient evidence for holding this—and it was his business to see that proper accounts were submitted and the occurrence of such an endorsement is most natural." Then he refers to the security bond which was given by Annada and three of his relatives in respect of the letters of administration and refers to the fact that they were to see that the estate was properly administered and accounts submitted and that the accounts would in the natural course be placed before Annada. He does not definitely find that the account exhibit 5 was signed by Annada. He stops short of coming to such a finding, although the tendency of his mind was in that direction, he does not say so. He evidently did not feel justified in saying so. It is the same sort of equivocal finding about the letter and the post card. He says that he doubts if there is sufficient ground for the Subordinate Judge's finding that they were fabrications. Having regard to the serious nature of the allegations and also having regard to the considered judgment of the Subordinate Judge it was only right and proper that he should also definitely and clearly state his views. This is a very important point in the case, but he has not dealt with it from the proper point of view.

So far as the mortgage deed is concerned the suit was instituted by the mortgagee, a decree was obtained thereupon and now there is an appeal pending against the decree. The question as to whether the mortgage deed has been paid off or not is the subject matter for determination in that suit, and if the plaintiffs knew of that suit it was right and proper for them to ask to be added as parties so far as that suit was concerned. In the suit as framed it was not suggested that Mokhadamoyee has fraudulently suppressed the fact or that she had colluded with the mortgagee in obtaining that mortgage decree; allegation of fraud has got to be particularized in the plaint. We do not find any such allegation here. What the precise nature of the fraud is has not been stated, nor what part

was taken by either Mokhadamoyee or the mortgagee in respect of that transaction. If they want to make a case of fraud which they have not made it may be open to them to pursue their remedies hereafter. But so far as the present suit is concerned we do not think that any fraud has been alleged, and we cannot therefore deal with the matter in the manner it has been done by the appellate Court.

It has been strenuously argued before us that the letters of administration were obtained by Mokhadamoyee without making any allegation that anything remained to be administered in the estate, that the order was improperly made upon insufficient materials and the sanction to borrow was also not properly granted. The letters of administration however have not been withdrawn and the civil Court has no jurisdiction to declare the order as null and void. The proper Court to set aside the letters of administration is the Probate Court. We think also that it was exceedingly improper on the part of the plaintiffs not to mention anything about the letters of administration in their plaint. They should not have suppressed that fact. We think it was deliberately done inas much as they felt it was a serious difficulty in their way.

In the result we are of opinion that the finding upon which the learned Judge reversed the decision of the Subordinate Judge are not satisfactory and we think that he has arrived at a wrong decision in the matter which we now reverse. The appeal is allowed and the plaintiff's suit is dismissed with costs in all the Courts.

A. T. M. *Appeal allowed: Suit dismissed.*

Before Mr. Justice Walmsley and Sir Syed Shamsul Huda, Knight, Judge.

CHANDRA KANTA BHATTACHARJEE AND OTHERS

v.

BEHARI LAL BHATTACHARJEE.*

Limitation—Limitation Act (IX of 1908), Sec. 20—Interest, part payment of—'Agent duly authorised'—Authorised by act of parties—Karta *of joint family.*

* Appeal from Appellate Decree No. 301 of 1917, against the decree of D. C. Patterson, Esq., District Judge of Backergunj, dated the 30th October, 1916, reversing that of Babu Jadav Chandra Bhattacharjee, Subordinate Judge, 2nd Court, of Backergunj, dated the 2nd June, 1915.

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The words 'agent duly authorised' in section 20 of the Limitation Act, include authority given by law as well as authority given by the act of parties.

A suit was instituted on the 4th April, 1912, against defendants Nos. 1 and 2, sons of A, for enforcement of a mortgage bond, dated the 21st August, 1900, executed by A and defendant No. 1. The amount was borrowed for family purposes, viz., for defraying the marriage expenses of defendant No. 1. A mortgage decree was passed in favour of the plaintiff and the mortgage properties were sold in execution of such decree. The sale proceeds having proved insufficient, an application was made for a personal decree in respect of the balance. A part of interest was paid on the 29th April, 1906, from funds belonging to both defendants, by defendant No. 1 who was at the time the *Karta* of the joint family, the father having died in the meantime. The defendant No. 2 was a minor. The defendant No. 1 in making the payment purported to act for himself and for his minor brother:

Held, that the application for personal decree was not barred by limitation, as the payment of interest saved the bar of limitation under section 20 of the Limitation Act.

That defendant No. 1 was an agent of defendant No. 2 duly authorised to make such payment.

Serada v. *Durgaram* (1) and *Har Prasad* v. *Harihar* (2) followed.

Appeal by the Plaintiffs.

Suit to enforce mortgage bond.

The material facts appear from the judgment.

Babus Brojendra Nath Chatterjee and *Suresh Chandra Talukdar* for the Appellants.

Babus Brojo Lal Chakravarti and *Sitaram Banerjee* for the Respondent.

C. A. V.

The judgments of the Court were as follows:

May, 8.

Shamsul Huda, J.—The suit out of which the present appeal arises was instituted on the 4th of April, 1912, against defendants 1 and 2 sons of one Umakanta for enforcement of a mortgage-bond, dated the 5th Bhadra, 1307 B.S. (21st August, 1900) executed by Umakanta and defendant No. 1. A mortgage decree was passed in favour of the plaintiff and the mortgage properties were sold in execution of such decree. The sale proceeds having proved insufficient an application was made for a personal decree in respect of the balance. The suit was instituted on the 4th of April. 1912, and on that date the personal remedy was barred by limitation unless payment of a part of the interest made on the 29th of Chaitra, 1312, (12th April, 1906) gave a fresh start to the plaintiff under

(1) (1910) I. L. R. 37 Calc. 461 : 11 C. L. J. 484.

(2) (1915) 19 C. W. N. 860.

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section 20 of the Limitation Act. That payment was made by the defendant No. 1 who was at the time the *karta* of the joint family, the father having died in the meantime. The defendant No. 2 is a minor. It is found that the amount borrowed was for family purposes viz. for defraying the marriage expenses of defendant No. 1. The endorsement made on the back of the bond clearly shows that in making the payment the defendant No. 1 purported to act for himself and for his minor brother which would indicate that he was acting for the minor as *karta* of the joint family. The learned Munsiff found that the payment was made from the funds belonging to both the defendants by defendant No. 1 who was the managing member of the family and passed a personal decree against both the defendants. On appeal by the defendant No. 2 the learned Additional District Judge of Backergunj absolved him from personal liability. Against this decree of the lower Court the plaintiff has appealed to this Court and the only substantial question of law that arises for our consideration is whether the payment made by defendant No. 1 under the circumstances stated above had the effect of saving limitation in respect of the claim as against defendant No. 2. The decision turns upon the question whether the defendant No. 1 was an agent of defendant No. 2 duly authorised to make such payment. I think the answer must be in the affirmative. For authority, if any is needed, I may refer to *Chinnaya Ngudu* v. *Gurunatham Chetti* (1); *Sarada Charan Chakraborty* v. *Durgaram Dey Sinha* (2); *Bhasker Tatya Shet* v. *Vijalal Nathu* (3); *Har Prosad Das* v. *Bakshi Harihar Prosad Singh* (4) and *Ram Charan Das* v. *Gaya Prasad* (5). The decision of the Madras High Court in *Narayana Ayyar* v. *Venkataramana Ayyar* (6), has however been relied upon as making those decisions inapplicable to cases in which a creditor deals not with the *karta* as such but with the individual members of the joint family. This decision seems to have been followed by a Division Bench of this Court in the case of *Baikuntha Nath Gui* v. *Lal Chand Samanta* (7). The decision of the Madras High Court on this particular point is not, I may state, a decision of a Full Bench. I find it difficult to understand how, where no question of estoppel arises, a creditor's course of dealing with the members of a joint family including the *karta* can possibly affect the

(1) (1881) I. L. R. 5 Mad. 169 F. B.
(2) (1910) 11 C. L. J. 484; 14 C. W. N. 741; I. L. R. 37 Calc. 461.
(3) (1892) I. L. R. 17 Bom. 512.
(4) (1915) 19 C. W. N. 860.
(5) (1908) I. L. R. 30 All. 422 F. B.
(6) (1900) I. L. R. 25 Mad. 229 F. B.
(7) (1914) 26 I. C. 511.

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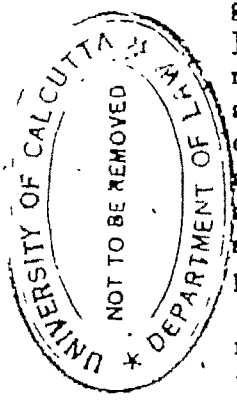
relation *inter se* between the *karta* and the other members of the family, nor does the case when carefully examined, lend any support to such a proposition. Apart from the fact that that was a case of acknowledgment under section 19 of the Limitation Act which stands on a somewhat different footing from the case of a payment under section 20 of the Act, the decision rests on the peculiar facts of that case from which the inference was drawn that in making the acknowledgment the *karta* was acting in his individual capacity and not as representing the other coparceners. As a matter of fact the question regarding the authority of the *karta* to bind the other members of his family by his own acknowledgment did not arise, the learned Judges having come to the conclusion that the *karta* in making the acknowledgment had acted in collusion with the creditor and therefore in contravention of the duty which he owed to the other coparceners. All that the learned Judges laid down in that case was that when a creditor deals not with the managing member only of a family, but with all the members of the undivided family as co-obligors and on that footing enters into a transaction thereby avoiding any question as to whether the transaction was really for the benefit of the family—he cannot rely upon an acknowledgment of the liability, made by one of them, as an acknowledgment duly made on behalf of all the co-obligors, by reason only that the person acknowledging is in fact the managing member of the family consisting of the co-obligors. The words 'agent duly authorised' would include authority given by law as well as authority given by the act of parties. This point was fully discussed by Banerji, J. in the case of *Ram Charan Das* v. *Gaya Prasad* (1) already referred to. In the present case there is the further fact that in so far at least as the liability of the father extended, the debt was binding on both the sons. As *karta* the defendant No 1 had not only authority to pay the debt of his minor coparcener but had the authority even to sell, if necessary, the joint family property to satisfy such debt. In taking this view of the case I do not feel pressed by the decision of this Court in the case of *Baikuntha Nath Gui* v. *Lal Chand Samanta* (2) as the facts of that case are materially different from the facts of this case. In that case it was found that the existence of joint family was not proved, that it was not proved that the payment was made as *karta* of the joint family, it was not shown that the money had come from the joint family fund, and it was not found that the borrowing had been made in respect of the joint family estate. Upon these findings the question of law



(1) (1908) I. L. R. 30 All. 422. (2) (1914) 26 I. C. 511.

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did not really arise. The case of *Sarada Charan Chakravarti* v. *Durgaram Dey Sirkar* (1) and the later decision in *Har Prosad Das* v. *Bakshi Harihar Prosad Singh* (2) seem to me exactly in point.

I would therefore reverse the decision of the Court below and restore that of the Munsiff.

The appellant is entitled to his costs in this Court and in the lower Courts.

Walmsley, J.—I agree.

A. T. M. *Appeal allowed.*

(1) (1910) I. L. R. 37 Calc. 461 ; 11 C. L. J. 484 ; 14 C. W. N. 741.
(2) (1915) 19 C. W. N. 860.

Before Mr. Justice Fletcher and Mr. Justice Teunon.

GOPAL CHANDRA BANERJEE AND OTHERS

v.

MAHAMMAD SOLEMAN MULLICK.*

CIVIL.
1916.
June, 30.

Burden of proof—Presumption—Uniform payment of rent exceeding 20 years—Bengal Tenancy Act (VIII of 1885), Sec. 50 (2).

When a tenant proves payment of rent at a uniform rate for a period exceeding 20 years, the presumption is that the tenant holds the land without being liable to have his rent increased unless and until the landlord shows something to the contrary.

Appeal by the Defendants.

Suit for enhancement of rent.

The material facts appear from the judgment.

Babu Jadu Nath Kanjilal for the Appellants.

Babu Nagendra Nath Ghose for the Respondent.

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The judgment of the Court was as follows :—

June, 30.

This is an appeal by the defendants, the tenants, from the decision of the learned Special Judge of Hughly affirming the decision of the Assistant Settlement officer. The suit was brought by the

* Appeal from Appellate Decree No. 1783 of 1915, against the decree of V. Dawson, Esq., Special Judge of Hughly, dated the 22nd April, 1915, affirming that of Babu Kshitish Chandra Haldar, Assistant Settlement Officer of Hughly, dated the 16th January, 1914.

CIVIL.
1916.
Gopal
v.
Soleman,

plaintiff for enhancement of rents. The tenants gave in evidence rent receipts which have been accepted by the Judge proving that rent had been paid at a uniform rate for a period exceeding twenty years. So that the presumption was that the tenants held the land without being liable to have their rent increased unless and until the landlord showed something to the contrary. The question is 'Has the landlord shown something to the contrary?' The learned Judge has not approached the case from that view. He says that the tenants do not show that they represent the persons who were formerly in possession of the land. The tenants' case was that the persons who were formerly in possession were their benamdars. The learned Judge says that he cannot accept that case. But the learned Judge had got to see whether the landlord had shown that these persons who were formely on the land were not the predecessors of the defendants, when once the defendants had alleged and produced in support of their allegation rent receipts covering a period of over twenty years showing that they paid rent at a uniform rate for that period. The defendants having given that evidence can rest on that evidence until the landlord displaces the presumption. The learned Judge has not decided the case from that view. The case must therefore, go back to the lower appellate Court to be reheard by the learned Special Judge. Costs will abide the result of the rehearing by the Court of appeal below.

A. T. M. *Case remanded.*

Before Mr. Justice N. R. Chatterjea, and Mr. Justice Newbould.

CIVIL.
1916.
December, 12.

DHIRENDRA NATH GHOSE AND OTHERS

v.

GOPI CHARAN SAHA AND OTHERS.*

Rent, enhancement of—Presumption—Bengal Tenancy Act (VIII of 1885), Sec. 50 (2)—Amalgamation of tenures—New tenancy.

A suit was instituted for enhancement of rent of a tenure. Defendants proved payment of rent at the same rate for a period of 20 years before the institution of

* Appeal from Appellate Decree No. 413 of 1913, against the decree of S. P. Sen, Esq., Special Judge of Faridpur, dated the 7th December, 1914, affirming that of Moulvi H. Rahaman, Assistant Settlement Officer at Rajbari, dated the 24th July, 1914.

the suit. Plaintiff produced a Kabuliat of the year 1260, corresponding to 1853 and relied upon it as showing that the tenants had agreed to pay enhancement of rent. There were originally four separate tenures which were amalgamated into one by the Kabuliat of 1853. The Kabuliat expressly stated that enhanced rent would be paid according to the rate of enhancement in the village. The other incidents of the tenure mentioned in the Kabuliat were not shown by the defendants to be the incidents of the four original tenures:

Held, that the plaintiff was entitled to enhancement of rent, as he rebutted the presumption arising under section 50 (2) of the Bengal Tenancy Act: *Bisheshur* v. *Rajendra* (1) distinguished.

Appeal by the Defendants.

Suit for enhancement of rent.

The material facts appear from the judgment.

Babus Mahendra Nath Ray and *Amarendra Nath Bose* for the Appellants.

None appeared for the Respondents.

The judgment of the Court was as follows:

December, 18.

This appeal arises out of a suit for enhancement of rent of a tenure. Defendants proved payment of rent at the same rate for a period of 20 years before the institution of the suit and the learned Subordinate Judge held that a presumption arose under section 50 (2) of the Bengal Tenancy Act, that the rent was being paid at that rate from the time of the Permanent Settlement. Plaintiff produced a Kabuliat of the year 1260 corresponding to 1853 and relied upon it as showing that the tenants had agreed to pay enhancement of rent. It appears that there were originally four separate tenures which were amalgamated into one by the Kabuliat of 1853. The main question for our consideration is whether there was the creation of a new tenancy under the Kabuliat or merely a recognition of the previously existing tenures. The learned Subordinate Judge was of opinion that there was no new tenancy created by the Kabuliat although the tenant expressly stipulated to pay enhanced rent. He relied upon the case of *Bisheshur Ray Chowdry* v. *Rajendra Kumar Singh* (1), in support of the proposition that, notwithstanding that the Kabuliat showed a variation of rent, it was merely a recognition of a previously existing tenure. The judgment in that case, however, shows that that was not so. The learned Chief Justice, in referring to the Kabuliat in that case, observes "The true meaning of this document has been the subject of considerable discussion before us, but this at least emerges clearly from the dis-

(1) (1914) 18 C. W. N. 949.

CIVIL.
1916.
Dhirendra v. Gopi Charan.

cussion that the document is the recognition of a previously existing interest and not the creation of a new one." There is nothing to show that the rent was a variable one or that the tenant had agreed to pay enhanced rent in that case. In the present case the Kabuliat expressly states that enhanced rent would be paid according to the rate of enhancement in the village. Then again, there is no suggestion that the other incidents of the tenure, as mentioned in the Kabuliat were the incidents of the four original tenures. That being so, we think, upon a proper construction of the Kabuliat, that it created a new tenancy although the four original tenures were amalgamated into one, and that if there was a new tenancy created in the year 1853 the presumption under section 50 (2) of the Bengal Tenancy Act is rebutted. The result is that the decrees of the Courts below are set aside and the case is sent back to the Court of first instance in order that the question of the amount of enhancement may be gone into, costs will abide the result.

A. T. M. *Appeal allowed : Case remanded.*

Before Sir Asutosh Chaudhuri, Knight, Judge, and Mr. Justice Cuming.

CIVIL.
1919.
August, 21, 25, 26.

NURUNNESSA KHANUM

v.

KHAJE MAHAMMAD SAKRU.*

Dower—Mahomedan Law—Relinquishment—Time—Consideration, if necessary—Free consent—Verbal relinquishment.

According to Mahomedan Law, the character of the obligation to pay the dower is a debt. The moment the dower is settled, it is enforceable as a debt. The dower becomes the property of the wife by the mere contract and she may therefore deal with or dispose of it before taking possession of the same. The woman is entitled to give it up or relinquish it in the continuance of the contract. It is not necessary that such relinquishment to be valid, must take place immediately after the husband's death. She can relinquish it at any time. It can be remitted in favour of the heir after the husband's death. No consideration is needed for such relinquishment. But free assent must be established. As the debt is enforceable

* Appeal from Original Decree No. 123 of 1918, against the decree of Babu Jitendra Prosad Chatterjee, Additional Subordinate Judge of Dacca, dated the 22nd December, 1917.

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NURUNNESSA v. MAHAMMAD SAKRU.

under the Contract Act, it can also be released under section 63 of the said Act.

Quære: Whether a dower debt could be discharged by verbal relinquishment?

Appeal by the Plaintiff.

Suit for dower by a Mahomedan lady against her husband's brother.

The material facts appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Sasadhar Roy (Sr.)* for the Appellant.

Babus Mahendra Nath Ray and *Bhupendra Chandra Guha* for the Respondent

C. A. V.

August, 28.

The judgment of the Court was as follows:

This is a suit for dower by a Mahomedan lady of rank against her husband's brother. The husband died on the 13th August, 1913 leaving her, and his brother his legal heir. The claim is based upon a Kabinnama said to have been executed on the 27th July, 1907, when the lady was a minor. The dower settled was Rs. 15,000, one-half payable on demand and the other half on dissolution of marriage. She attained majority in January, 1913, that is about three months before the death of her husband. That there was a Kabinnama was disputed by the defendants and it was also said that she had verbally relinquished her claim for dower after the death of her husband and thus released the estate from liability. The learned Subordinate Judge has held the first point in the plaintiff's favour, and as regards the second point he discusses the evidence and says that although there are minor discrepancies he is "inclined to believe that the plaintiff released the dower" when her husband's dead body was being removed.

It was argued, on behalf of the plaintiff that even if it be so held, effect ought not to be given to any words of release she might have used, as she was then overwhelmed with grief and could not have made a relinquishment of her free will, that there was evidence that her mother and sister urged her at that time to make such a remission: and that such release if any, ought not to be considered as valid and binding upon her. The learned Subordinate Judge did not think there was any force in this argument, as the plaintiff "knew that it was her sacred duty to make her late husband free from liabilities to her, and she released her dower voluntarily although her sister and mother might have reminded her of her duty at that time, when it was the duty of every near relation to bid

CIVIL.

1919.

Nurunnessa v. Mahammad Sakru.

goodbye to the departed soul and wish him a safe voyage to his place of rest." This issue having been held in the defendant's favour and her suit dismissed she has preferred this appeal.

It is an admitted fact in the case that "the plaintiff and her late husband had very great love for each other, and that she became overwhelmed with grief for his untimely death" (para 7 written statement). What happened at the time the dead body was taken away is described by the defendant's witness Saliman Bibi in this way: "There was great noise there on account of crying. At the time of seeing the dead man's face, Nurunnessa's mother and sister held her and took her there. They took her there near the dead body to show her his face. The face was shown while they stood in front of the door of the hall. They were within the hall when they saw the face. Even when she was looking at the face, Nurunnessa (the plaintiff) was crying loudly " ... ... Nurunnessa said this when she forgave 'I have relinquished my claim to Rs. 10,000 as dower, May God also pardon you'— ... ... The dead body was taken away as soon as the face was shown." Another witness Mahabatjan said "The ladies were in the hall; they saw the face; the plaintiff was amongst the ladies; ... ... She began to weep very much; her mother and her sister requested her not to weep but to do her duty then and forgive the Moharana. She then gave up her Moharana saying 'I have forgiven my Moharana, May God also forgive you.' She said this while she was weeping. ... ... The plaintiff was weeping very much at the time of seeing the face ... ... when she came to see the dead body her mother or sister took her there by holding her arm; her arm was being held when she gave up the claim." Khaja Enaet Hossein said. " "The plaintiff then saw the face and wept aloud; her elder sister then told her to give up the Moharana; the plaintiff while weeping said 'I have forgiven my Moharana, God will also.' The dead body was then taken out." Khaja Fakirulla said "The plaintiff was brought to the front of the door frame by her mother, her elder sister, Musa Miah's mother and my sister Lotifunnessa Bibi. The plaintiff was weeping then; she was overwhelmed with grief. ... ... The plaintiff's mother said something to her and her sister too said something."

It has been argued before us that even if the discrepancies in the statements of the witnesses as regards the amount and the manner in which the Moharana was said to have been given up be overlooked and the finding of the Subordinate Judge that the plaintiff relinquished her dower at that time be accepted yet no effect should

be given to it, as an act of that character must be shown to have been voluntarily and deliberately made; that her free will and deliberate judgment had been exercised. If it was a case of a document executed at that time relinquishing her dower, the Court would have required proof that she had independent advice, and was capable of exercising her judgment, that she was free from influences. It was argued that a lady in that state of mind, at such a critical time and in such surroundings was likely to be greatly influenced by any expressions of opinion that her act was a meritorious and a religious one. As she might thus have felt impelled to make a relinquishment, but advantage ought not to be taken of that fact and effect ought not to be given to it, when she is not prepared to give up her claim after consideration: that there is nothing in the Mahomedan Law that such relinquishment cannot be made except on that occasion.

Baillie in his Digest says (2nd Ed., Part I, page 553, 1875) that "the gift of dower to a dead husband is valid on a favourable construction of the law." A footnote adds "to release him from responsibility at the date of judgment." Ameer Ali in his Mahomedan Law, 4th Ed., Vol. I, Chap. II, section iii, page 174 says, "A woman may release her dower to her deceased husband, that is, a widow is entitled to exonerate or discharge the estate of her deceased husband from the liability of her dower-debt." In the 4th Ed. of Wilson's Digest of Mahomedan Law we find a new section added as 74A which runs thus: "The release of dower by a wife to husband is expressly sanctioned by the Koran (K IV 4 which is a mistake for IV 3) and is therefore not void for want of consideration." The passage in the Koran runs thus: "give the women their dower freely; but if they voluntarily remit unto you any part of it, enjoy it with satisfaction. (Sale's Koran IV 3) see Wherry's Ed. (Trubner's Oriental Series) Vol. ii, page 69. The same Surah is translated by Rodwell thus:—"Give women their dowry freely; but if of themselves they give up aught thereof to you, then enjoy it as convenient and profitable." (The Koran: Everyman's Library Edn. page 411). The above passage refers to remission of the dower to the husband in his lifetime. "Voluntarily" in its ordinary sense means, freely, without compulsion; not under any obligation: *A. G.* v. *Ellis* (1). It was held in *Jyani Begam* v. *Umrao Begam* (2) that according to Mahomedan Law a dower is a debt and its remission by a widow without acceptance

(1) (1895) 2 Q. B. 466. (2) (1908) I. L. R. 32 Bom. 613.

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by the heirs of the husband is effective. It was argued in that case that according to Mahomedan Law the remission of a debt extinguishes it and it is not necessary that there should be any acceptance of the remission on the part of the debtor. It was contended on the other hand that the formula pronounced "I have given up my dower for the sake of God and his Apostle" showed that the remission was in the form of a Sadak (Religious gift); that a gift according to the Mahomedan Law requires tender, acceptance and seisin (Hedaya 2nd Edn., Book XXX, Chap. i, page 482): that the intention of the donor ought to be declared in the presence of the donee and in the case of Sadak, seisin is necessary (Hedaya page 489). The learned Judge accepted the view that according to Mahomedan Law a debt remitted is a debt extinguished and that no acceptance is required In *Abi Dhunimsa Bibi* v. *Mahammad Fathiuddin* (1) it was held that a relinquishment of her right to dower by a Mahomedan woman, who is a minor under the Indian Majority Act, is invalid under the Indian Contract Act (IX of 1872). That case decided as to whether the relinquishment of a dower was "an act in the matter of the dower" and protected by section 2 of the Indian Majority Act. Both the above cases are not of much help in this case. According to the Mahomedan Law it is well established that the character of the obligation to pay the dower is a debt. The moment the dower is settled it is enforceable as a debt. The dower becomes the property of the wife by the mere contract and she may therefore deal with or dispose of it before taking possession of the same. [Shama Charan Sircar's Mahomedan Law: Tagore Lecture (1874) page 361]. The dower is the right of the woman solely: and hence it is that she is empowered to give it up or relinquish it in the continuance of the contract. (Hamilton's Hedaya Book II, Chapter iii, page 45). As the debt is enforceable under the Contract Act it can also be released under section 63 of the Contract Act, but the question is whether the remission which is said to have been made in this case can be considered as binding upon the lady and irrevocable. We think that in all such cases free assent must be established. It might be shown that the lady voluntarily and deliberately gave up her right. It is quite true that members of the family to which she belonged knew the precept in the Koran, if it can be so called; and she also knew instances, in her own family where dower had been given up and that it was looked upon as a meritorious act. But she was overwhelmed with grief at the time, the body was

(1) (1917)-I. L. R. 41 Mad. 1036.

just about to be removed for burial and that very near relatives spoke to her about its being a meritorious act. She was surrounded by female relatives and it is very natural that under those circumstances a very young woman was led to say something which was understood as a relinquishment of her dower debt, without having considered the matter from her personal point of view and under a sudden emotional impulse. Circumstances of this character have impelled Hindu women to perform the Sati. If a document had been given by this lady at that time—relinquishing her rights in favour of the heir it would have been looked upon with disfavour and we think that an alleged verbal relinquishment under such circumstances ought not to be favoured. There is nothing in the Mahomedan Law that such relinquishment to be valid must take place immediately after the husband's death. She can relinquish it at any time. It can be remitted in favour of the heir after the husband's death. No consideration seems to be needed for such relinquishment, but what we have to see is whether she had the opportunity of considering the matter when it is said she gave up her claim. She was in the presence of death and in great mental distress. She had no time for freedom of thought and action. It is also conceded by the learned Vakil for the respondent that free assent must be established. That is a question irrespective of Mahomedan Law. We think she was prompted and was not a free agent at the time. She was not in a position to exercise free and deliberate judgment and that influence was exercised which she was not in a position to overcome. It is immaterial that she was influenced by her own mother and sister. Under those circumstances we are unable to uphold the alleged relinquishment as valid.

The learned Subordinate Judge has drawn an adverse inference against her from the fact that the Kabinnamah is not forthcoming. He thinks that inasmuch as the lady relinquished her claim it was not looked upon as a valuable document and that no care was taken to preserve it. The fact is that it was with the mother who is dead and it cannot be found. The loss of the document need not be taken against her. She has married again and it may be that she has been influenced by her present husband to make the claim but it is a legal debt which was due te her and which is not time-barred. She is in possession of some of the husband's immovable properties. That debt according to the Mahomedan Law is a lien upon the property in her possession. It was argued that the lien could not be discharged by a verbal relinquishment; that under the Registration Act it was necessary to have a registered document.

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There is some force in this contention, but even if we do not accept it as correct, having regard to the circumstances of the case we cannot hold that the relinquishment is operative.

After the case had been fully argued before us an application was made yesterday on behalf of the respondent that he should be allowed to argue certain other points which we were told his Vakil considered worthy of discussion, namely that there was no sufficient evidence about the due execution of the Kabinnamah and also about its loss. No points other than those referred to in our judgment were even indicated when the appeal was argued. The arguments took the best portion of two days and we think it is too late to rehear the matter. We cannot do so in the absence of the other side. One of us is going to leave India for six months, and this is the last day before the long vacation. We are unable to accede to the prayer.

We allow the appeal with costs in both Courts. There will be a decree for Rs. 15,000 in favour of the plaintiff against the estate left by her husband Khaja Mahomed Arjoo, with interest at 6% from date of suit.

A. T. M. *Appeal allowed.*

APPELLATE CRIMINAL.

Before Sir Asutosh Chaudhuri, Knight, Judge, Mr. Justice Newbould and Sir Syed Shamsul Huda, Knight, Judge.

CRIMINAL.
1919.
August, 6, 7.

SURYYA KANTA BHATTACHARYYA
v.
KING-EMPEROR.*

Misdirection—Accomplice—Offence under alternative case upon same state of facts—Evidence of a participator of crime—Man of low morality—Testimony of accomplice.

Per Chaudhuri and Shamsul Huda, JJ. : One G, a witness for the prosecution and a gomosta of a Marwari firm, loaded 135 bags of rice weighing about 254 maunds in a wagon at a station D to be sent to R and they were so sent. The proper charge for the consignment was Rs. 28-11 as. The Railway books showed

* Criminal Appeal No. 322 of 1919, against the decision of A. Mellor Esq., Sessions Judge of Assam Valley District, dated the 5th May, 1919.

an entry of Rs. 8-4 as. against this item which was put down as 60 bags weighing 100 mds. The entry in the rokar of the Marwari firm showed a debit of Rs. 10 4 as. namely, Rs. 2 more. The actual quantity proved to have been sent was 254 mds. and the Railway books at D contained untrue entries Rs. 8-4 as. was the proper charge for 100 mds., but having regard to the quantity, the Railway should have been paid Rs. 12-7 as. more. G's statement was that the Station Master asked Rs. 10-4 as. from him as freight and he paid that sum. The entries in the Railway books were made by the Goods clerk and his statement was that he made them under the directions of the Station Master accused:

Held, that the offence in respect of the sum of Rs. 2 was either receiving a bribe, or that of criminal breach of trust.

That G was an accomplice in respect of an offence under section 161 of the Indian Penal Code, which was an alternative case practically upon the same facts.

Per Chaudhuri, and Newbould, JJ.: A Judge misdirects when he tells the jury that the statement of one accused may be taken for what it is worth against the other.

Per Newbould, J.: The word '*accomplice*' is not defined in the Evidence Act or in any other Indian Statute. An indication of its meaning may be found in section 337 of the Criminal Procedure Code. There the word accomplice is used in the marginal note and the section itself refers to "any person supposed to have been directly or indirectly concerned in the offence under enquiry."

A witness who is alleged to have taken part jointly with the accused in an offence different from that for which the accused is being tried, is not an accomplice.

Per Shamsul Huda, J.: To constitute an accomplice there need only be the intention for assisting in the commission of a crime: he need not know exactly what crime is being committed.

An accused person cannot be convicted solely upon the evidence of a person who is more or less a participator in the crime of which he is accused. His evidence is no better than that of an accomplice.

The Queen v. *Chande* (1); *Ishan* v. *Queen-Empress* (2); and *Alimuddin* v. *Queen-Empress* (3) followed.

There is nothing to prevent a man of low morality being believed by jury but if that person is an accomplice, it is unsafe to convict on his uncorroborated testimony. It casts upon the Judge the duty of warning the jury against acting on such testimony.

The corroboration must be by evidence sufficient to connect the accused with the offence charged.

Appeal under section 410 of the Code of Criminal Procedure.

The accused was convicted under section 408 of the Indian Penal Code.

(1) (1875) 24 W. R. Cr. 55. (2) (1893) I. L. R. 21 Calc. 328.
(3) (1895) I. L. R. 23 Calc. 361.

CRIMINAL.

1919.

Surjya Kanta
v.
King-Emperor.

The appeal first came on for hearing before Mr. Justice Newbould and Sir Syed Shamsul Huda, Knight, Judge, who differed and delivered the following judgments :

Newbould, J.—This is an appeal by Surjya Kanta Bhattacharjya who has been convicted on the charge of having committed breach of trust as a servant and has been sentenced to three years' rigorous imprisonment under section 408 of the Indian Penal Code. The appellant was tried jointly with one Ananda Kishore De before the Sessions Judge of the Assam Valley Districts and a jury. Both accused were charged with having committed criminal breach of trust as servants. Ananda Kishore De was charged with having made false entries in certain documents and hereby committed an offence punishable under section 477A of the Indian Penal Code and the appellant Suryya Kanta Bhattacharyya was charged with abetment of this offence. The jury unanimously found Ananda Kishore De not guilty of both charges and by a majority of three to two found the appellant Suryya Kanta Bhattacharyya guilty on the charge under section 408 Indian Penal Code only.

The case for the prosecution so far as it relates to the charge on which the appellant has been convicted is as follows :—In October last Suryya Kanta Bhattacharyya was Station Master and Ananda Kishore De was Goods clerk at Dumduma station on the Dibrusadiya Railway. On the 8th October, Golap Rai (P. W. 3) loaded a consignment of 135 bags of rice at Dumduma Station to be sent to Rupai siding on the same railway. For the freight and other charges on this consignment Golap Rai paid Rs. 10-4 to the Station Master, the appellant, but he credited Rs. 8-4 only to the Railway Company and misappropriated the difference, rupees two.

The case for the prosecution depends very largely on the evidence of this Golap Rai. The verdict of the majority of the jury shows that they accepted his evidence and the learned Sessions Judge in commenting on this verdict has stated that he sees no reason to distrust the evidence of Golap Rai. Whether Golap Rai should be believed or not was for the jury to decide and we must accept their decision unless we are satisfied that there has been a misdirection in the Judge's charge to the jury which has in fact occasioned a failure of justice. It is contended on behalf of the appellant that there has been such misdirection. The point that was most strongly urged was that Golap Rai was an accomplice and the Judge omitted to give the necessary directions to the jury as to the danger of convicting on the evidence of an accomplice unless

it was corroborated in material particulars. In my opinion this contention fails for the reason that Golap Rai was not an accomplice in the meaning of that word as used in sections 114(b) and 133 of the Indian Evidence Act. It is not suggested that Golap Rai was an accomplice in the offence for which the appellant has been convicted nor in the other offence punishable under section 477A Indian Penal Code with which he and his co-accused were charged. What is alleged is that Golap Rai was an accomplice in a different fraud which was not the subject matter of the trial. This accusation against Golap Rai is based on the following facts. The 135 bags of rice sent from Dumduma on the 18th October, weighed 254 maunds. It was charged for as a consignment of 60 bags weighing 100 maunds the result being that Golap Rai had to pay less than half the amount he would have had to pay if the correct charges had been levied. From this we are asked to infer that Golap Rai was conspiring with the person responsible for the booking of the goods to defraud the Railway Company of the difference between the amount paid and the amount payable as freight. The appellant alleges a conspiracy between Golap Rai and the co-accused but so far as the argument that Golap Rai was an accomplice is concerned, it is immaterial whether he conspired with the appellant or the other accused. The first answer to this argument is, as stated by the learned Sessions Judge, that there is no evidence to support this allegation of a conspiracy between Golap Rai and either of the accused. There are suspicious facts but this accusation was not investigated at the trial and Golap Rai was not given an opportunity of explaining these facts. An examination of his evidence shows that instead of it being suggested to him that he was paying too little, he was asked if he did not suspect that the Station Master was charging him more than the rate allowed. Secondly, I would hold that even if the inference were drawn that Golap Rai was a party to a conspiracy to defraud the Company, he would not be an accomplice within the meaning of that term as used in the Evidence Act and the case law on the duty of a Judge when charging a jury as to the value of an accomplice's evidence. The word accomplice is not defined in the Evidence Act or any other Indian Statute. An indication of its meaning may be found in section 337 of the Criminal Procedure Code. There the word accomplice is used in the marginal note and the section itself refers to "any person supposed to have been directly or indirectly concerned in the offence under enquiry." Golap Rai was not concerned in the offence under enquiry. It was

CRIMINAL.
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Newbould, J.

clearly put to the jury that they must find that the sum of Rs 10-4 was paid by him as freight before they would convict the appellant on the charge under section 408 Indian Penal Code. If, as the jury have found, Golap Rai paid this sum as freight, he was not even indirectly concerned with the offence under enquiry. The meaning of the word 'accomplice was considered by Sir Subrahmania Ayyar, Officiating Chief Justice of the Madras High Court in the case of *Ramaswami Gounden* v. *Emperor* (1) In that case it was held that a witness, who was alleged to have assisted in the removal of the dead body of a murdered person from the place of murder to the pit in which it was buried and delayed to report the murder, was not an accomplice and the rule of practice as to corroboration had no application to the case. So far as I am aware it has never been held that a witness who is alleged to have taken part jointly with the accused in an offence different from that for which the accused is being tried should be regarded as an accomplice so that the jury must be told that it is unsafe to convict on his uncorroborated evidence. In the present case I hold that the learned Sessions Judge did not misdirect the jury when he told them they should hold the appellant to be guilty of misappropriation, if Golap Rai's evidence be believed, without warning them that it was unsafe to convict on his evidence unless it was corroborated in material particulars. I should add that there would be no difficulty in the case if Golap Rai were an accomplice in the offence under enquiry since in that case his evidence would be obviously false and the charge would have failed not on the ground that the principal witness required corroboration, but because there was no evidence to support the charge at all if he were disbelieved. For the same reason the case would fail if the jury held that Golap Rai paid the sum of Rs. 2 as a bribe and not as freight.

The other points urged on behalf of the appellant can be dealt with more shortly. It was said that the Jury should not have been told that the evidence of Golap Rai was corroborated. In my opinion the learned Sessions judge was right in saying; "If it is believed that it is necessary to apply to the Station Master when a whole wagon is required, this would be good corroboration of Golap Rai's evidence." If the Station Master was the person to whom the application should have been made, the Jury would be justified in thinking it probable that Golap did apply to the Station Master himself if he says he did.

Then it is said that the Jury ought not to have been told that

(1) (1903) I. L. R. 27 Mad. 271 (277).

they had to decide whether to believe the prosecution witnesses Benoy Bhusan and Khetra Nath who tried to throw the responsibility on to the Assistant Goods clerk the other accused. Had not the Jury's attention been drawn to the question of the credibility of these witnesses there would have been a serious misdirection. Each accused threw the blame on the other and the Jury could not properly decide as to the guilt or innocence of the Assistant Goods clerk without considering the credibility of this evidence.

Another point taken is that the defence of the appellant was not properly put to the Jury. The main defence of the appellant was an attempt to throw the blame on his co-accused and this was clearly stated. It was contended that the defence that the Assistant Goods clerk and Golap Rai were acting in collusion to defraud the Company in the manner mentioned above in relation to the point of Golap Rai being accomplice, was not properly put. But the learned Sessions Judge drew attention to the difference between the number of bags and their weight shown in the documents and their actual number and weight and said that this could not be a mere mistake and must have been intentionally misstated with the object of showing favour to the consignor and defrauding the railway or in the alternative the officer responsible must have accepted the word of the consignor. At another part of his charge he told the jury that it was argued that Golap Rai must have bribed the accused or one of them to charge less than the full amount of freight and that they should consider whether if this were so Golap Rai should be disbelieved on this account. This shows that the attention of the jury was drawn to the line of defence.

There is one misdirection. The jury should not have been told that the statement of one accused should have been taken for what it was worth against the other. As however the learned Sessions Judge was careful to point that these statements were of practically no value as evidence, I cannot hold that this misdirection has occasioned a failure of justice.

A point was made on the basis of a remark in the charge that certain evidence was wholly irrelevant. It is not quite clear whether the learned Sessions Judge used this word in the special sense in which it is used in the Evidence Act or in its ordinary sense. The use of the qualifying adverb suggests that he did not mean to use it as a term of law. It may be that the evidence was relevant to prove facts, that it was necessary for the prosecution to establish at the commencement of the trial but that owing to those facts being undisputed this evidence did not require the jury's consideration.

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However that may be it does not appear that this evidence could have had any influence on the decision of the jury.

The learned Sessions Judge in his charge to the jury has expressed his opinion on the evidence. But he did not do more than he was authorised to do by clause (2) of section 293 of the Code of Criminal Procedure. He was careful throughout his charge to impress on the jury that the decision of all questions of fact rested with them.

The sentence passed is not too severe.

I would therefore dismiss this appeal.

As my learned brother is of a different opinion, the case will be laid before another judge of the Court under the provision of section 429 of the Code of Criminal Procedure.

Shamsul Huda, J.:—The facts as disclosed by the evidence for the prosecution are shortly these: Golap Rai the Gumasta of a Marwari Firm on the 11th of October 1918 brought 135 bags containing about 258 maunds of rice to the Dum-Duma Railway station and loaded them in wagon No. 2158 for being carried to Rupai Siding, the consignee being the Rupai Tea Estate. Again on the 18th of October he brought and loaded in wagon No. 1396 another 135 bags containing about 254 maunds of rice. There is no entry regarding the first consignment in the books of the railway but as regards the second consignment the entries show a consignment of 60 bags weighing 100 maunds and Rs. 8-4 as paid as freight. For the quantity shown in the books this was admittedly the correct charge. But the account book of the Marwari's firm shows that the actual amount paid for the second consignment was Rs. 10-4 *i.e.*, two rupees more than the amount entered in the books of the railway. The charge under section 408 relates to this sum. At the time of making these consignments the accused No. 1 Ananda Kishore Dey was the Assistant Goods clerk and the accused No. 2 Surja Kanta Bhattacharjee, the appellant before us, was the Station Master. All the entries relating to the second consignment in the papers and registers of the Railway are in the handwriting of the first accused Ananda Kishore. If the correct quantity had been entered the correct charge would have been Rs. 20-4 as. The consignee thus paid Rs. 10 less for freight on the second consignment but calculated upon the weight falsely entered he made an excess payment of Rs. 2. These facts are undisputed. These irregularities having come to the notice of the Traffic Manager Mr. Anderson, there was an investigation by a C. I. D. Officer as

the result of which the two accused were placed on their trial on a charge under section 408 against both of them. There was also a charge under section 477A against the first accused Ananda, and a charge for abetting the said offence against the second accused Surja Kanta.

The defence of Ananda Kishore was that he had nothing to do with the transaction except that he made certain entries under the direction of Surja Kanta. In the same way Surja Kanta's defence was that he left these matters to the Assistant Goods clerk and that he had no knowledge of the fraud committed by Ananda Kishore. Under the rules the responsibility rested with the Station Master but as the learned Judge pointed out this theoretic responsibility must be distinguished from criminal liability.

On these facts and apart from the evidence of Golap Rai to which I shall refer later the offence disclosed against the person who received the money was either that he received the extra Rs. 2 as bribe or that he committed criminal breach of trust in respect of that sum. The case was one of receiving a bribe if it is assumed that Golap Rai knew that he was paying more than the proper charge from which it may be reasonably inferred that the excess amount was paid by way of bribe to escape liability for the extra Rs. 10 that was chargeable for the whole consignment but it was criminal breach of trust if the whole amount was paid as freight and a part of it viz., Rs. 2 was misappropriated. From the facts as I have stated them it is difficult to imagine that Golap Rai was an honest consignor and that he was no privy to the fraud that was committed on the Railway. It appears that to constitute an accomplice there need only be the intention for assisting in the commission of a crime, but he need not know exactly what crime is being committed. This was the view taken by Lord Chief Justice Isaac in the case of *Charles Cratchley* (1), in which reference was made in the case of *Lord Baltimore* (2). Even if Golap Rai was not an accomplice in the technical sense of the term his evidence was no better than that of an accomplice and should have been dealt with on that footing : *The Queen* v. *Chando Chandalinee* (3) ; *Alimuddin* v. *Queen-Empress* (4) and *Ishan Chandra Chandra* v. *Queen-Empress* (5). Golap Rai admits being in the service of the Marwari Firm for the last 8 or 9 years He says that for the first consignment he was charged only Rs. 7 and that when an excess amount of Rs. 3

(1) (1913) 9 Cr. App. Rep. 232.
(2) (1763) 4 Burr 2179.
(3) (1875) 24 W. R. Cr. 55.
(4) (1895) I. L. R. 23 Calc. 361.
(5) (1893) I. L. R. 21 Calc. 328.

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4 as. was charged for the second consignment he grumbled but Surjya Kanta told him it was all right Subsequently he modified this statement and said he did not ask the Station Master why the amount charged for was in excess of the amount charged on the 11th. Whilst Golap Rai or his employer saved about Rs. 10 the Railway official, whoever he was, gained only Rs. 2. It is inconceivable that the Railway officials charged Golap Rai Rs. 10 less for his benefit or for the benefit of his employers without his complicity. However, it is not for me to find the facts. The jury have acquitted Ananda and have convicted Suryya Kanta only. The case against Suryya Kanta as pointed out by the learned Sessions Judge depends entirely on the statement of Golap Rai to the effect that he transacted the business with the Station Master alone and paid him the money. It seems to me that upon the facts as I have stated them the jury had ample materials upon which to hold that Golap Rai was an accomplice and that the extra Rs. 2 was paid as bribe either to the first or the second accused. It was due to the appellant that the learned Judge should have explained to the jury what an accomplice was, should have asked them to say upon the facts before them whether Golap Rai was or was not an accomplice. The jury should then have been told that if Golap Rai was a party to the conspiracy to cheat the Railway Company he was an accomplice it was not safe or proper to convict upon his evidence without corroboration on material particulars. He should have also explained to the jury, what was the nature of corroboration necessary in such cases: *Jamiruddi Mosalli* v. *Emperor* (1). Instead of that the learned Judge told the jury that Golap Rai was an independent witness, that he was not connected with the Railway and that he had no interest in the success of the prosecution. With reference to the argument that Golap Rai was an accomplice, the learned Judge observed as follows: "It is however argued that he must have bribed the accused or one of them to charge less than the correct amount of freight. This is possible but there is no evidence to show that he did so and the accused are not being charged with accepting a bribe in consideration of showing favour to Golap Rai. The jury should therefore consider whether Golap Rai can be considered as an accomplice in this case, and also whether, if he did give a bribe to either of the accused, he should be regarded as a person of less than average morality and on that account to be disbelieved." These observations are open to serious objections: *First*, if Golap Rai was in the conspiracy, he was an accomplice

(1) (1902) I. L. R. 29 Calc. 783.

and it made no difference that the advisers of the crown instead of charging Suryya Kanta for receiving a bribe charged him with criminal breach of trust; *secondly*, the Judge should have distinctly told the Jury that it was not enough to find that Golap Rai paid Rs. 10-4 as. and the amount credited was Rs. 8-4 but they must be satisfied that the whole amount was paid as freight and if the extra Rs. 2 was paid as bribe the charge under 408 could not stand. But instead of saying this the learned Judge told the jury that there was no evidence to show that Golap Rai had paid a bribe. There was no direct evidence but the circumstantial evidence was ample to justify the jury in coming to the conclusion that the extra Rs. 2 was paid by way of bribe and not as freight. By this expression of opinion the learned Judge shut out the jury from holding that Golap Rai had really paid a bribe so that the charge under section 408 was not established. *Thirdly*, it was not enough assuming that Golap Rai was an accomplice that he should be regarded as a person of less than average morality and on that account to be disbelieved There is nothing to prevent a man of low morality being believed by a jury but if that person is an accomplice the law says that it is unsafe to convict on his uncorroborated testimony and casts upon the Judge the duty of warning the jury against acting on such testimony. This duty has not been discharged in the present case.

Again referring to the rules and actual practice and to the evidence of Golap Rai that he applied to the Station Master for a whole carriage, the learned Judge said, "if it is believed that it is necessary to apply to the Station Master when a whole wagon is required this would be a good corroboration of Golap Rai's evidence." Although at the same time the learned Judge pointed out that the evidence of Mr. Anderson and others showed that this duty was generally performed by the Assistant Goods clerk and that the Station Master would not in ordinary cases even know about it, he ought to have told the jury that the corroboration required must be something that connected the accused with the crime. If Golap Rai was an accomplice, his statement that he applied to the Station Master would not in my opinion be corroborated by the mere circumstances that the rules required such applications to be made to that officer. The corroboration must be by evidence sufficient to connect the accused with the offence charged. The mere existence of the rules is not such corroboration.

On these grounds I think that the verdict of the jury in this case is vitiated by misdirection and want of proper direction and

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that a fresh trial should be ordered. If the jury had been properly directed it is likely that they would have brought a verdict of not guilty against the appellant and such a verdict would have been amply justified by the evidence.

I regret I have to differ in this case from the decision of my learned brother.

As there was this difference of opinion, the case subsequently came up before Chaudhuri, J.

Babus D. N. Bagchi and *Heramba Lal Sanyal* for the Accused.

Mr. Orr for the Crown.

C. A. V.

The judgment of the Court was as follows :

August, 7.

Chaudhuri, J.:—The appellant a Station Master was tried jointly with another, a goods clerk, before the Sessions Judge of the Assam Valley Districts and a jury under section 408, Indian Penal Code, for criminal breach of trust as railway servants. The goods clerk was also charged under section 477 A for fabrication of certain entries and the appellant with abetment thereof.

The jury unanimously found the Goods clerk not guilty of both charges ; the majority however (3 to 2) found the appellant guilty under section 408. The Judge agreeing with the majority has sentenced him to three years rigorous imprisonment. Hence this appeal. It was heard by the Criminal Bench, but owing to a difference of opinion, it has come before me under section 429 Criminal Procedure Code.

The facts are shortly these. One Golap Rai (P. W. 3) the Gomasta of a Marwari firm on the 18th December 1918, loaded 135 bags of rice weighing about 254 maunds in a wagon at the Dumduma station to be sent to Rupai siding and they were so sent. The proper charge for the consignment was Rs. 20-11. The Railway Books show an entry of Rs. 8-4 against this item which is put down as 60 bags weighing 100 maunds. The entry in the Rokur of the Marwari Firm shows a debit of Rs. 10-4, namely Rs. 2 more. The actual quantity proved to have been sent was 254 maunds and the Railway books at Dumduma contained untrue entries. Rs. 8-4 is the proper charge for 100 maunds, but having regard to the quantity the Railway should have been paid Rs. 12-7 more. Golap Rai's statement is that the Station Master asked Rs. 10-4 from him as freight and he paid that sum. The entries in the Railway books were made by the Goods clerk and his statement is that he made them under the directions of the Station Master accused. The

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It does not mention the weight, although other entries in his book such as Ex. 20(5), 20(1), 20(2), 20(4), mention both the number of bags and weight. He is paid by the weight. These facts do not appear to have been put before the jury in connection with the credibility of Golap Rai. No doubt the charge is under section 408 and that depends upon the truth of the statement of the witness Golap Rai that he paid Rs. 10-4 as freight, but if he paid Rs. 2 as a bribe to charge him less than the actual freight payable, he was clearly an accomplice in respect of an offence under section 161 Indian Penal Code which is clearly an alternative case practically upon the same facts. I think it was incumbent upon the Judge to direct the mind of the Jury to this aspect of the case and his failure to do so is a serious misdirection as the case practically depends upon the evidence of Golap Rai. The learned Judge merely said this "It is however argued that he must have bribed the accused or one of them to charge less than the correct amount of freight. This is possible but there is no evidence to show that he did so and the accused are not being charged with accepting a bribe in consideration of showing favour to Golap Rai. The Jury should therefore consider whether Golap Rai can be considered as an accomplice in this case, and also whether, if he did give a bribe to either of the accused, he should be regarded as a person of less than average morality and on that account to be disbelieved." I agree with Mr. Justice Huda that "these observations are open to serious objection: *First*, if Golap Rai was in the conspiracy, he was an accomplice and it made no difference that the advisers of the crown instead of charging Surja Kanta for receiving a bribe charged him with criminal breach of trust; *secondly*, the Judge should have distinctly told the Jury that it was not enough to find that Golap Rai paid Rs. 10-4 and the amount credited was Rs. 8-4 but they must be satisfied that the whole amount was paid as freight and if the extra Rs. 2 was paid as bribe the charge under section 408 could not stand. But instead of saying this the learned Judge told the jury that there was no evidence to show that Golap Rai had paid a bribe. There was no direct evidence but the circumstantial evidence was ample to justify the jury in coming to the conclusion that the extra Rs. 2 was paid by way of bribe and not as freight. By this expression of opinion the learned Judge shut out the jury from holding that Golap Rai had really paid a bribe so that the charge under section 408 was not established." Newbould, J., also says that if Golap Rai paid Rs. 2 as bribe and not as freight, the case failed. The evidence of Golap Rai about

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the payment stands uncorroborated. He said he asked the Station Master for a wagon and was told the freight to be paid. That also is not corroborated by any other evidence. It seems to me also that sufficient attention was not called to the evidence relating to the practice said to have been followed at this Railway station about the consignment of goods and applications for wagons. If the general rule about applications for wagons can be treated as corroborating the statement of Golap Rai that he applied to the Station Master, it is clear that if the practice as stated by the two witnesses was true, it went against it.

I agree with Mr. Justice Newbould that the Judge misdirected when he told the jury that the statement of one accused might be taken for what it was worth against the other. The Judge no doubt added that it was practically of no value as evidence, but in a case where there is so little evidence on the main point considerable value may have been attached to these statements.

I think on the whole the misdirections above referred to were serious and have occasioned a failure of justice and the conviction ought to be and is accordingly set aside and the accused discharged.

I have been told that the whole of the evidence available has been given in this case, and as it depends upon the evidence of one man who may have been a participator in the fraud on the Railway and the accused has already been in jail for some months, I do not think that in the circumstances a retrial should be ordered.

A. T. M. *Appeal allowed: Conviction set aside: Accused discharged.*

CRIMINAL REVISION.

Before Sir Lancelot Sanderson, Knight, Chief Justice and Mr. Justice Duval.

CHAUDHURI MEAH AND OTHERS

v.

ABDUL RAHAMAN.*

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1919.
August, 7.

Sanction for prosecution—Discretion—Criminal Procedure Code (Act V of 1898), Sec. 195—Proceeding abortive.

Section 195 of the Code of Criminal Procedure vests in the Court a discretion as regards granting sanction to prosecute. "There are, however, certain rules of

* Criminal Revision No. 652 of 1919, against the decision of B. Ghatak Esq., Sessions Judge of Noakhali, dated the 5th July, 1919.

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prudence to which any Court exercising its discretion would have regard, and, pre-eminently among them, possibly a compendious statement of all, would be the rule that the Court will be astute to see that there shall be no abuse of the administration of criminal justice." *In re an Attorney* (1) followed.

Where there is a strong probability that the proceedings taken under section 195 of the Criminal Procedure Code, would be abortive, sanction for prosecution should be refused.

Application for revision under section 435 of the Code of Criminal Procedure.

Application for sanction to prosecute the petitioners under section 195 of the Code of Criminal Procedure.

The material facts appear from the judgment.

Babu Suresh Chandra Talukdar for the Petitioners.

Babu Hemendra Kumar Das for the Complainant Opposite Party.

The judgments of the Court were as follows:

August 15.

Sanderson, C. J.—This is a rule granted to show cause why an order sanctioning the prosecution of the seven petitioners by Mr. Ghatak, the learned Sessions Judge, should not be set aside.

The matter comes before us under section 195 (b) of the Code of Criminal Procedure which provides that "Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate," and, this Court has to decide whether the sanction given by the learned Sessions Judge should be revoked in the case of all the petitioners or in the case of any of them. The conclusion of the learned Judge's judgment was in these terms: "I accordingly sanction prosecution of the opposite parties or such of them as are guilty of the offences mentioned or any of such offences." It was argued by the learned vakil who appeared on behalf of the complainant that this order was irregular and could not stand and that the learned Judge ought to have decided with regard to each of the petitioners whether it was proper to sanction the prosecution against him: The learned vakil who appeared for the complainant has abandoned his application for sanction as regards petitioners 4, 5, 6, and 7: and, consequently inasmuch as the application was on behalf of the complainant alone, the Crown having taken no part in the proceedings, I do not think it is necessary to investigate the case of those petitioners any further; and, as far as petitioners 4 to 7 are concerned, the sanction which has been granted is revoked.

As regards the other three petitioners, before arriving at our

(1) (1913) I. L. R. 41 Calc. 446.

decision it is necessary to state certain facts, which I think show that the proceedings in this case were out of the ordinary: It appears that one Chaudhuri Meah lodged a case against Abdul Rahaman under section 471 and other sections. The Magistrate summoned the accused Abdul Rahaman and held an enquiry in his presence in the course of which a large number of witnesses were examined at the instance of Chaudhuri Meah, and they were cross-examined at some length by the accused. The Magistrate disbelieved Chaudhuri Mea's case, discharged the accused and ordered that Chaudhuri Meah and his witnesses Nobin Chandra Mojumdar and Kashi Chandra Mojumdar who are the second and third petitioners in this Court, should be prosecuted for bringing a false case. Against that order a motion was preferred before the learned Sessions Judge who, after an investigation, held that there was sufficient evidence against Abdul Rahaman and that the order of discharge was improper on the evidence. The result was that the learned Judge set aside the order of discharge and directed a further inquiry. The case was heard by another Deputy Magistrate who found that there was a *prima facie* case against the accused Abdul Rahaman and committed him to the Sessions. The case was tried before Mr. De, the learned Sessions Judge, and the accused was acquitted, the learned Judge saying that he acquitted him on the ground that he considered that there was a reasonable doubt as to the guilt of the accused. During these proceedings, the order for the prosecution of Chaudhuri Meah and petitioners 2 and 3 was in abeyance. Then Chaudhuri Meah, Nobin and Kashi applied to the learned Sessions Judge to refer the order for the prosecution of them to the High Court, so that it might be quashed. The learned Judge refused so to do and gave a considered judgment setting out his reasons for his refusal, Then an application was made to the High Court for a Rule to set aside the order made by the Magistrate, directing the prosecution of Chaudhuri Meah and his two witnesses. Upon that application my learned brothers Mr. Justice Richardson and Mr. Justice Shamsul Huda set aside the order mainly on the ground that it was made more than a year ago and at a time when the evidence had not been so fully brought before the Court as it was afterwards. They therefore set aside that order, but directed that an application might be made by the District Magistrate to the learned Sessions Judge to make an order under section 476. They also directed that it would be open to the learned Sessions Judge, if he was moved under section 195, of the Code of Criminal Procedure, to sanction the prosecution of the petitioners. Subsequently an application was made

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to Mr. Ghatak, the learned Sessions Judge, for sanction to prosecute not only Chandhuri Meah and his two witnesses Nobin and Kashi but also the other petitioners, and thereupon the learned Judge made the order which I have read.

Now, the question remains whether my learned brother and I are prepared to uphold the sanction which has been granted by the learned Sessions Judge as regards the first three petitioners, Chandhuri Meah, Nobin and Kashi.

I desire it to be clearly understood that anything I say in my judgment is not intended to be in any way departing from or minimising what was said by the late learned Chief Justice *in the case of an Attorney* (1). At page 458 he said, "There are, however, certain rules of prudence to which any Court exercising its discretion would have regard, and pre-eminent among them, possibly a compendious statement of all, would be the rule that the Court will be astute to see that there shall be no abuse of the administration of criminal justice." The learned Chief Justice had already pointed out that the matter was one for the discretion of the Court to which the application was made. Our decision in this case is arrived at upon the peculiar and somewhat special facts of this case, and the conclusion at which we arrive is that the sanction which has been granted with regard to the first three petitioners should be revoked. In my judgment the matters disclosed in the various judgments and proceedings to which I have referred go to show that if proceedings were taken against these three petitioners, there is a strong probability that they would be abortive. On these grounds in my judgment the sanction should be revoked.

The Rule is made absolute as regards all the petitioners.

Duval, J.—I agree.

A. T. M. *Rule made absolute.*

(1) (1913) I. L. R. 41 Calc. 446.

APPELLATE CIVIL.

Before Sir Asutosh Chaudhuri, Knight, Judge, and Mr. Justice Cuming.

NITYA GOPAL BANERJEE

v.

PROVAS CHANDRA MUKHERJI AND OTHERS.*

CIVIL.
1919.
June, 2.
August, 8, 27.

Pala; *transfer of—Right of management and right of service in connection with temples, distinction between—Alienation to stranger—Private alienation—Custom—Property dedicated to deity, character of—Shebait, power of—Sale of Shebaiti right, if permissible—Worship, right of—Transfer inter vivos—Transfer by will—Deed of sale treated as a deed of gift—Sale of* pala *apart from endowed property, if valid.*

The requisites of custom are that it should be ancient and invariable, uniform, reasonable, not immoral, certain and consistent. About its being ancient it must have existed "so long that the memory of man runneth not to the contrary."

There is a distinction between the right of management and the right of service in connection with temples, private and public, and between compulsory and private alienations. Private alienations are not absolutely prohibited, but alienations to strangers have not been favoured. In the case of private alienations, the prohibition is of general application and custom and usage govern and prevail over the text law which prohibits both partition and alienation.

Custom, if established, may render private alienations valid, but that in determining the question, the benefit to the idol must be taken into consideration as a matter of primary importance. Property dedicated to a deity is *extra commercium*, and is entitled to special protection of the sovereign whose duty it is to intervene to prevent fraud and waste: *Bhupati* v. *Ram Lal* (1) referred to. Persons having the management and possession of the property of an idol must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property: *Prasanno Kumari* v. *Golab Chand* (2) referred to. The manager of the endowment is by virtue of his office the administrator of the property attached to it. As regards the property he is in the position of a trustee, *Ramanathan* v. *Muruguppa* (3) referred to. Sale of the trusteeship for pecuniary gain is not permissible: *Rajah Vurmah* v. *Ravi Vurmah* (4) referred to. The sale of a priestly office for the benefit of a shebait is illegal: *Narasimma* v. *Ananthu* (5) and *Kuppa Gurubal* v. *Dora-*

* Appeal from Appellate Decree No. 1166 of 1918, against the decision of H. C. Maitland Esq., Additional District Judge of Hooghly, dated the 22nd January, 1918, reversing that of Babu Devendra Nath Pal, Subordinate Judge of Howrah, dated the 29th July, 1915.

(1) (1909) 10 C. L. J. 355; I. L. R. 37 Calc. 128.
(2) (1875) 14 B. L. R. 450 P. C.; 23 W. R. 253; L. R. 2 I. A. 145.
(3) (1906) I. L. R. 29 Mad. 283; 4 C. L. J. 189; 10 C. W. N. 825 P. C.
(4) (1876) I. L. R. 1 Mad. 235; L. R. 4 I. A. 76.
(5) (1881) I. L. R. 4 Mad. 391.

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samsi (1) referred to. Right of worship is property, but has not all the incidents of property. A distinction has been made between transfers *inter vivos* and transfers by will. The shebait is a manager or a quasi trustee for the benefit of the idol as the office endures only for his life; he has no right of devise by will as his will comes into operation on his death when there is nothing for him to alienate: *Rajeshwar* v. *Gopeshwar* (2), and *Mirad* v. *Shibadas* (3) referred to.

A was entitled to a turn of worship of a deity which extended to 39 days in the year. A died on the 14th November, 1913. The plaintiff claimed that turn of worship as his heir. A, however, a few days before his death executed a deed of sale in favour of defendant No. 1 who was in the line of succession, in respect of 33 days out of his turn. There was no consideration for this *kabala*. The donor who was very ill died within a very few days of the execution of the document.

The origin of the foundation of the endowment was not known. There was some immovable debutter property and offerings were also received which were taken by the persons enjoying the *palas*. It was not clear whether the endowment was private or public. The transfer of *palas* was not always made to heirs or co-sharer shebaits but in one case at least to a relative considered competent to carry on or supervise the worship. The periods of the turns were determined by descent and the shebaits treated themselves as co-sharers of the endowed properties, their shares being determined in the same manner as if the property was secular, inheritable by descent. In every instance the co-sharer's *pala* and his so-called share in the debutter property had been transferred at the same time:

Held, that as the transfer was not for pecuniary advantage, it was intended to provide for the due performance of the *pooja* and as there was no near heir to transfer it, it could be treated as a deed of gift, though it was intended to operate as a will, and not as a deed of sale.

That transfer of *pala* and offerings apart from immovable property, was not valid and effective; *Mahamaya* v. *Haridas* (4) distinguished.

Division by inheritance of a *pala* is on a different basis from division by transaction *inter vivos* or by devise.

Appeal by the Plaintiff.

Suit for declaration of the plaintiff's right to a turn of worship sold by his predecessor in interest.

The material facts appear from the judgment.

Babus Brojo Lal Chuckerbutty and *Upendra Narain Bagchi* for the Appellant.

Dr. Sarat Chandra Basak and *Babu Chandra Sekhar Sen* for the Respondents.

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(1) (1882) I. L. R. 6 Mad. 76.
(2) (1907) I. L. R. 35 Calc. 226 (230); 7 C. L. J. 315.
(3) (1909) I. L. R. 36 Calc. 975.
(4) (1914) 20 C. L. J. 183; I. L. R. 42 Calc. 455.

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The judgment of the Court was as follows :

One Nilmony Chakravarti was entitled to a turn of worship of a deity known as Malai-Chandi which extended to 39 days in the year. Nilmony died on the 14th November, 1913. The plaintiff claimed that turn of worship as his heir. Nilmony however a few days before his death executed a kobala in favour of defendant No. 1 in respect of 33 days out of his turn. The kabala purports to have been for consideration, for a sum of Rs. 300 said to have been spent during the illness of Nilmony. The learned Subordinate Judge held that there was no consideration for the kobala and that undue influence had been exercised over Nilmony who was ill and that misrepresentations had also been made to him. He held that the transfer was only of the turn of worship irrespective of the debutter property and as according to him no custom for such transfer had been made, out there was not an effective transfer. On both the above grounds he decreed the plaintiff's suit. He however found that the defendant No. 1 was on the line of succesion being the sister's son of the shebait Gobinda Chakravarti and that he could become a shebait if Gobinda died without any sons.

On appeal the learned District Judge agreed with the trial Court that it had not been established that there was money consideration for the document. He however found that the defendant and his wife resided for some time on a portion of Nilmony's homestead. and that as Nilmony's health did not permit him to perform the pooja defendant No. 1 had for some time performed the pooja : that during his last illness defendant No. 1 and his wife attended on him and that the kobala was executed openly, and after consultation with other shebaits : that the document had been presented by Nilmony himself for registration and he was satisfied upon the evidence that Nilmony quite understood what he was doing, and although the word "sale" had been used in the kobala he found that Nilmony desired to convey the *pala* to the extent of 33 days to defendant No 1 : that he had by a subsequent document made a gift of the remaining six days to his purohit Dharmadas He also found that it was a perfectly natural thing for Nilmony to desire to transfer the right of worship to defendant No. 1. On the death of Kalachand who was the original defendant his son Nonilal has been brought upon the record. The learned Judge did not find that Nilmony was induced to make the transfer by undue influence, and he held that although the document purported to be a kobala it should be looked upon as a gift, although the consideration mentioned was fictitious and imaginary.

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He also held that transfers of *pálas* had been proved to have been made for a great number of years beginning from at least 1259 B. S. (1852 A. D.). He held upon the oral evidence and the documents produced before him, principally Exs. C, D, E, F, G, J, K that the *pálas* of the Thakurani were transferable by custom. He found nothing in the cross-examination of the shebait witnesses to indicate that "the custom of transfering *pálas* was restricted to transferences of *pálas* along with the debutter lands." He held "immemorial origin, continuity and certainty of the custom of transfers of *pálas* of the goddess in question established" and disagreeing with the learned Subordinate Judge, he dismissed the plaintiff's suit.

It was urged before us on behalf of the appellants (1) that no custom had been established and the immemorial origin referred to by the District Judge was an overstatement, as there was no evidence of any transfer before 1852, (2) that the transfer was bad not being to one in the line of succession or to a shebait, but to a person who although connected with one of the shebaits and was his possible heir, was not competent to take, (3) that the transfer of a *pála* apart from the debutter property was void, (4) that the document being one of sale stated to be for consideration ought not to be treated as a gift (5) that as the man was suffering from death-illness, the document having been executed on the 10th November, 1913 and registered on the 13th November, and the man dying on the 14th, the transfer could not be treated as being *intervivos* (6), that the division of the *pála* into two portions, 33 days to defendant No. 1 and six days to another rendered both illegal.

In answer to the above it was argued that having regard to a series of transfers dating from 1852 and the finding arrived at by the learned Judge as regards custom such finding could not be set aside or questioned on second appeal: that the transfer in this case was to one in the line of shebaits, not to a stranger, but to a person who was performing the service in the life-time of Nilmony. that the transfer was openly made with the consent of several other shebaits and ought to be looked upon as for the benefit of the trust, which is the governing principle for determining such questions: that the transfer of a *pála* apart from transfer of the property was not a question which was raised at the earlier stages of the case: that the document in question showed that the transfer was to Kalachand "as a shebait," but whether these words actually covered a transfer of the debutter property or not was not of importance as the plaintiff had merely prayed to have the transfer of the turn of worship set aside; that there was evidence on the record to show that the

plaintiff had himself sold his share in some of the debutter properties which he purported to have inherited from Nilmony: that an ostensible deed of sale may be treated as a deed of gift and it had been rightly treated as such in this case: that the transfer was not affected by the fact that the man died shortly after the execution of the document: that a *pala* being divisible by inheritance there was no reason why the holder who had the right of gift *inter vivos* could not apportion the period of his turn to different persons: that in all these cases the principal thing to be kept in view was whether the transaction was against the interest of the deity: if not so found, there was nothing on principle which prevented such a division: that no point as to the divisibility of the *pala* had been made in the trial and the Appeal Courts and not even taken in the grounds of appeal before this court and should not therefore be entertained. It is therefore necessary to examine the case at some length.

The origin of this foundation is not known. The Thakurani is established in a village. The plaint mentions 33 persons as the present shebaits, all of whom have been made defendants. They are Banerjis, Mukerjis, Chatterjis, Chakravarties, Roys and consist of males and females. Defendant No. 1. in his written statement gives the names of 70 other persons, males and females, including Chakravarties, Chatterjis, Banerjis and one Sarkhel. The Chakravartis appear to have been the original shebaits, and that daughters, sisters' sons, widowed daughters-in-law, maternal grandfather's heirs have taken by transfers or descent. In what sense all these persons are shebaits is not very clear. Whether they have merely a right of management, or are the representatives of priests who served the idol does not appear. There is some immovable debutter property and offerings are also received which are taken by the persons enjoying the *palas*. There is some evidence, says the subordinate Judge, that "the *palas* have been assigned and transferred to one who could come in the line of succession if there was no direct descendant in the line of the son." Whether the endowment is private or public does not clearly appear, although it is apparently the latter as a village sanctuary is mentioned and offerings from the public are received. The transactions evidenced by documents are all of them conveyances except one the earliest in date, which is a will (Ex. K.) dated 30th. Sravan 1259, corresponding to 19th August, 1852. It transferred the entire *pala* of the testator and his share of the debutter property to his widowed daughter-in-law as she was the most competent person to carry on the worship, by which supervision of the worship was meant. The testator had no son, but had a daughter

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with a son who was residing elsewhere. The next in order of date is a kobala Ex. G, dated 30th Sravan, 1289, (14th August 1882). The vendor had got the *pâla* and property by inheritance but as he was not a resident of the place he sold both to a co-sharer shebait. There are two kobalas Ex. C & D in 1292. Both the vendors were females who had inherited the *pala* and property from their husbands. In one the sale was to a co-sharer shebait, in the other to reversionary heirs, but both sales included the *pala* and property. Having regard to the names of the shebaits who are Banerjis, Mukherjis, Chatterjis etc. it is not a violent inference that the present shebaits represent both the male and female lines of the original shebaits and also transferees by will or sale. It is clear that nonresident shebaits have from time to time, for a great number of years transferred their rights to co-sharer shebaits. Exhibit J, a Kobala dated 19th Sraban, 1292 (6th August, 1885) is however said to be an instance of a sale to a stranger, but the document itself refers to him as a shebait and we must treat him as such

In speaking of custom in connection with the transfer of the rights of shebaits in respect of shrines and sanctuaries, there is likelihood of confusion between the rules of the shrines and the rules observed amongst those who manage the shrines, between the rules of a sect and the rules of management of the endowment; between shebaits as trustees of the endowed property and as managers of the service, in respect of which they are holders of an office. We have nothing to do in this case with sectarian rules, but with an alleged custom of transfer of turns of worship by shebait. The requisites of custom are that it should be ancient and invariable, uniform, reasonable, not immoral, certain and consistent. About its being ancient it must have existed "so long that the memory of man runneth not to the contrary." In *Garuradhwaja Prashad Singh* v. *Saparnadhwaja* (1) the evidence of an unbroken custom for 80 years was held sufficient It was also held in *Ramanathan Chetti* v. *Murugappa Chetti* (2), that an unbroken usage for a period of 19 years was conclusive evidence of a family arrangement as to *palas*, or turns of worship, to which the Court was bound to give effect. Here we have evidence of some transactions which date as far back as 1852 and question is, can we deduce the necessary elements of custom from them. It appears from the evidence that transfers of *palas* were not always made to heirs or co-sharer shebaits but in one case at least to a relative considered competent to carry on or super-

(1) (1900) L. R. 27 I. A. 238; I. L. R. 23 All. 37.

(2) (1906) I. L. R. 29 Mad. 283 4 C. L. J. 189; 10 N. C. W, 825 (P. C.).

vise the worship. The periods of the turns have been determined by descent and apparently the shebaits have treated themselves as co-sharers of the endowed properties, their shares being determined in the same manner as if the property was secular, inheritable by descent, that is to say a shebait with a *pala* of 39 days in the year has been treated as co-sharer of the endowed property to the extent of 39/365. In every instance so far as the documents are concerned the co-sharer's *pala* and his so-called share in the debutter property have been transferred at the same time. It is from that fact that the learned Subordinate Judge inferred that the custom pointed to transfers of both of them jointly, that one was not separated from the other. He considered the joint character of the transfer reasonable, as the worship was likely to suffer if the property was separated from the sheba. The property in this case was undoubtedly endowed for the sheba and must be so used. The managers of the service are also managers of the endowed property in this case and it is evident that for convenience of management the shebaits have treated themselves as co-sharers in respect of the *palas* and the endowed property but in no instance has a shebait treated his *pala* and right of management of the debutter property separately. The two are intimately associated together and do not appear to have been dealt with one independently by the others. The subdivision has been as a rule by descent although occasionally varied by transfers within a limited circle. The transferee had both at the same time and after his death his heirs have become vested with his rights to both by descent. The mere transfer of the *pala* involves the possibility of its discontinuance, on failure of funds. The property was endowed for securing the permanence of the worship. It further involves two lines of descent. If the transferor merely transfers the *pala* and keeps hold of his share of the property two separate lines of descent may be created—one for the *pala* and one for the property —each disconnected from the other. In this particular instance the transfer appears to be merely of the *pala* and the offerings, spoken of in the document as (*Utpanna* profits). It does not deal with the immovable property. If it was intended to deal with the landed property, the document would have been differently stamped, particulars of the property would have been given as required by the Registration act and the extent of the share would have been mentioned. From these circumstances it has been taken by both the Courts below that the *pala* only has been transferred and with it the right to take the offerings. The plaintiff has treated Nilmony's share of the endowed property as his by descent and the transferee has

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not so far questioned it. There is a distinction between the right of management and the right of service in connection with temples, private and public, and between compulsory and private alienations. Private alienations have not been held as absolutely prohibited, but alienations to strangers have not been favoured. In the case of private alienations the prohibition has not been held to be of general application and custom and usage have been held to govern, and prevail over the text law which prohibits both partition and alienation. These questions are discussed at some length in *Rajaram* v. *Ganesh* (1). It is useless to refer to the decided cases in detail as they depend upon separate sets of facts and circumstances, although some general principles may be deduced from them which may be thus summarised. Custom if established may render private alienations valid, but that in determining the question, the benefit to the idol must be taken into consideration as a matter of primary importance. Property dedicated to a deity is *extra commercium*, and is entitled to special protection of the Sovereign whose duty it is to intervene to prevent fraud and waste (*Bhupati Nath Smrititirtha* v. *Ram Lal* (2)]. Persons having the management and possession of the property of an idol must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property (*Prosunno Kumari Debya* v. *Golab Chand* (3). The manager of the endowment is by virtue of his office the administrator of the property attached to it. As regards the property he is in the position of a trustee [*Ramanathan Chetti* v. *Murugappa Chetti* (4)]. Sale of the trusteeship for pecuniary gain is not permissible: *Rajah Vermah Valia* v. *Ravi Vurmah* (5)]. The sale of a priestly office for the benefit of a shebait is illegal: *Narasimma* v. *Anantha Bhatta* (6) and *Kupka Gurukal* v. *Dorasami* (7). Right of worship is property, but has not all the incidents of property. A distinction has been made between transfers *inter vivos* and transfers by will. It has been said that the shebait is manager or quasi trustee for the benefit of the idol and as the office endures only for his life he has no right of devise by will as his will only comes into operation on his death when there is nothing for him to alienate [*Rajeshwar Mullick* v. *Gopeshwar Mullick* (8)]. This case is not in consonance

(1) (1898) I. L. R. 23 Bom. 131.
(2) (1909) 10 C. L. J. 355. I. L. R. 37 Calc. 128.
(3) (1875) 14 B. L. R. 450 P. C.
(4) (1906) 10 C. W. N. 825 P. C.
(5) (1876) I. L. R. 1 Mad. 235 P. C.
(6) (1881) I. L. R. 4 Mad. 391.
( ) L . 6 Mad. 76.
(8) (1907) I. L. R. 35 Calc. 226, 230.

with *Mancharam* v. *Pranshankar*(1) which was disapproved in *Rajeshwar* v. *Gopeshwar* (2), but it has since been followed in this Court in *Nirad Mohini Dassi* v *Shibadas Pal Dewasin* (3), where "clear benefit to the Thakur" was considered to be the right standard. In the case before us there is evidence of transfer of the *pala* and property by will. The deed of sale has been held inoperative as such, but the learned Judge has treated it as a deed of gift, as a transaction *inter vivos*. The donor however who was very ill died within a very few days of the execution of the document and it seems a fairly reasonable deduction that it was executed in anticipation of his death and to operate after his death. The document mentions money consideration which has been disbelieved by both the Courts. We should not treat untrue recitals in deeds with any degree of complacency when the giver and the taker are parties to them. They are intended to mislead and may acquire the sanctity of truth with age. This very transaction although discarded by the Courts as a conveyance may yet be relied upon by future shebaits as affording good evidence of custom. This transfer, however, was not for pecuniary advantage. There is evidence that the giver was not actuated by any dishonest motives. He was on his deathbed and acted after consultation with other shebaits. He had no near heirs. He was anxious to provide for due carriage of the sheba and he knew the taker who had done the work satisfactorily when he was ill. These circumstances may lessen the heinousness of a false recital, namely that of a fictitious consideration, but all the same the transaction must be looked upon as reprehensible, especially as it relates to a religious trust. The giver made a lying statement to benefit the taker and it is clear that the taker was primarily responsible for it. Both took a discreditable part. The learned Judge has on the strength of *Ismail Mussajee* v. *Hafiz Beo* (4), has treated the document as a deed of gift. There was an issue in that case as to whether the donor who was capable of making the transfer was of unsound mind or not, but none with regard to undue influence which was the case suggested at a later stage, when the birth contention failed. The Judicial Committee found the evidence insufficient to establish the latter contention. They took into account the existing circumstances at the time of the transaction, namely, that the mother was extremely hostile to her son and did not intend him to take; she was old and in case of her death her son would

(1) (1882) I. L. R. 6 Bom. 298. (2) (1907) I. L. R. 33 Calc. 226.
(3) (1909) I. L. R. 36 Calc. 975.
(4) (1906) I. L. R. 33 Calc. 773 : 3 C. L. J. 484 ; 10 C. W. N. 570 P. C.

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have inherited the greater part of her property. The only way to prevent it was to transfer it in her life-time. A power of attorney which had been executed by the mother showed that she contemplated an absolute gift to the daughter. The lady's object could not have been attained by any *benami* transaction. It was found that the consideration mentioned in the deed of transfer did not pass but having regard to the above facts the judicial committee held that the deed of sale was intended to be a deed of gift and treated it as such. The transfer in the case was not for pecuniary advantage and was intended to provide for the due performance of the Poojah and there was no near heir to transfer to and it may not be unjust to treat it as a deed of gift and although it was intended to operate as a will, having regard to the fact that transfers by will have taken place, and as early as 1852, that circumstance also may be taken in its favour. The learned District Judge has differed from the Subordinate Judge on the question as to whether the *pala* can be rightly held transferable by custom although the debutter property has not been included. The latter has strongly relied upon *Makamaya Debi* v. *Haridas Halder* (1). Evidence as regards the custom in this case has gone up to 1852 and may be held established but the severance of the *pala* from the property does not seem to have taken place before this transaction and, can not be held, established her custom. Their separation is fraught with consequences which may not be beneficial to the deity. They are intimately associated with each other. Allowing the *pala* to one and the property to another is likely to create trouble to the detriment of the endowment. They were not intended to be severed and have not been treated as severable. Division by inheritance is on a different basis from division by transactions *inter vivos* or by devise. In this case the donor's 39 days have been divided into two parts. 33 days to Kalachand and 6 days to the purohit Dharmadas, who we do not find spoken of as a member of the family. Although objection to such division of the *pala* does not appear to have been taken before this, the respondent cannot be said to have been taken by surprise. It is a point of law. He had sufficient time to consider it. The fact of division is admitted. In the Kalighat temple case *Makamaya* v. *Haridas* (1) *palas* were found heritable, partible and also devisable by custom. They had been the subject of sales, gifts, mortgages and leases, although within a limited circle. The *palas* seem to have been treated as not connected with the immovable property if any

(1) (1914) 20 C. L. J. 183.

belonging to the maker. The facts of that case are different. The transactions extended over a long period and were of a different character. That case deals with accepted principles but otherwise does not apply to this case. We do not think that it was competent for Nilmony to subdivide the period of his *pala*. The *palas* would again be subdivided by descent and instead of one branch having 39 days, there is a possibility of three branches being created with two divisions of the *pala* and one branch holding the property. There may be subdivisions again *intervivos* on the strength of the present subdivision. We do not certainly think that it is a reasonable method of management of the property or of conducting the *sheba*. It is bound to create dissension and confusion which certainly cannot be for the benefit of the Thakur. There is every likelihood of the property being diverted for other purposes and dissipated and the *sheba* discontinued. In that view we think the appeal ought to be allowed. If it had merely been a question of the subdivision of the *pala* into two parts and if it was said that opportunity should be given to the defendant to give evidence on the point we would have remanded the case; but as we agree with the view taken by the Subordinate Judge that the custom of separation of the *pala* and the property has not been proved and of the unreasonable character of such separation, that it cannot be for the benefit of the deity, the appeal should be allowed on that ground alone. Each party to pay his own costs in all Courts. The defendant will not be held liable for rendering any account of the offering or the dealings with them The plaintiff will not be allowed to recover anything from him on that account. The transfer is held inoperative and void and there will be a declaration to that effect.

A. T. M

Appeal allowed.

CIVIL RULE.

Before Sir Asutosh Mookerjee, Knight, Judge.

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KALYAN SINGH AND OTHERS

v.

RAMGOLAM SINGH AND OTHERS.*

Inherent power—Judge, duty of—Failure to decide a case—Substantial right of parties.

It is the duty of a Judge to try the causes set down for trial before him and the failure of the Court to decide a case after submission cannot be permitted to defeat the substantial rights of a litigant.

The judgment-debtors and objectors, the petitioners, preferred an appeal against an order of the Subordinate Judge of Monghyr dated the 8th June, 1904, in the matter of an application for restitution in execution proceedings, in the High Court. The appellate Court on the 12th February, 1906, passed the following order: "We suggested to the learned Vakil for the appellants that perhaps the best way to deal with the case would be that the appeal should be withdrawn, leaving it to the present appellants, who are the judgment-debtors and objectors, to bring a suit to recover possession of the property in dispute, the present decree-holders, respondents, undertaking that neither the present proceedings for restitution, nor the fact that the previous suit brought by the present appellants was subsequently dismissed for non-prosecution on the 5th March, 1903, shall in any sense be treated as a bar to any fresh suit which the present appellants may be advised to institute in relation to the disputed property. Both parties agreeing, we by consent make the order accordingly."

On the 19th April, 1911, a suit was accordingly instituted in the Court of the Subordinate Judge at Monghyr. The suit was tried on the merits and was dismissed, on the 14th August, 1912. The plaintiffs lodged an appeal in the High Court on the 6th January, 1913. The appellate Court, of its own motion, on the 4th June, 1915, held that the suit was barred under section 103 of the Code of Civil Procedure of 1882 and dismissed it on that ground. The plaintiffs then applied on the 1st September, 1916, to rescind the order made by the Division Bench on their appeal on the 12th February, 1906, so that the appeal might be restored and heard on the merits:

Held, that the Court had inherent power to vacate the order to enable it to discharge the duty cast on it as a Court of justice to determine the controversy between the parties.

Application for review.

The material facts appear from the judgment.

Babus Dwarka Nath Chuckerbutty and *Kali Kinkar Chuckerbutty* for the Petitioners.

* Civil Rule No. 744 of 1916, in the matter of Appeal from Original Order No. 495 of 1904 decided by Maclean, C. J. and Mookerjee, J. on the 12th February, 1906.

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Babus Biraj Mohan Mojumdar and *Ramendra Mohan Majumdar* for the Opposite Party.

The judgment of the Court was delivered by

C. A. V.

Mookerjee, J.—This is an application to vacate an order made by the late Chief Justice Sir Francis Maclean and myself on the 12th February, 1906 in Appeal from Original Order 495 of 1904. That appeal was directed against an order of the Subordinate Judge of Monghyr dated the 6th June, 1904, in the matter of an application for restitution in execution proceedings. The effect of the order of the Subordinate Judge was that the objection to the grant of restitution was overruled. The judgment of this Court which was delivered by the Chief Justice was as follows :

"We think this case has fallen into a little confusion, possibly, speaking with all respect, by reason of the order made by a Division Bench of this Court ; but let that pass. We suggested to the learned Vakil for the appellants that perhaps the best way to deal with the case would be that the appeal should be withdrawn, leaving it to the present appellants, who are the judgment-debtors and objectors, to bring a suit to recover possession of the property in dispute, the present decree-holders, respondents, undertaking that neither the present proceedings for restitution, nor the fact that the previous suit brought by the present appellants (No. 359 of 1900) was subsequently dismissed for non-prosecution on the 5th of March, 1903, shall in any sense be treated as a bar to any fresh suit which the present appellants may be advised to institute in relation to the disputed property. Both parties agreeing, we by consent make the order accordingly. We make no order as to the costs of this appeal."

This order was made in the presence of Mr. Digambar Chatterjee and Mr. Dwarkanath Chakrabarti who represented the appellants and of Dr. Rashbihari Ghosh, Maulvi Md. Yusoof and Mr. Haribhushan Mookerjee who represented the respondents. The parties and their representatives thought that a satisfactory way had been found for the investigation of the matters in controversy. On the 19th April, 1911 a suit was instituted as contemplated by the order of this Court, in the Court of the Subordinate Judge at Monghyr. The suit was tried on the merits and was dismissed on the 14th August, 1912. The plaintiffs lodged an appeal in this Court on the 6th January, 1913. The papers were printed in due course, and the appeal was set down for disposal before Fletcher and

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Richardson, JJ. on the 4th June, 1915. The Court, of its own motion, raised the question, whether the suit could be maintained in view of the dismissal for non-prosecution on the 5th March, 1903 of the suit of 1900. The question was not taken up at the instance of either party. The plaintiffs could not possibly raise a question as to the competence of their suit. The defendants, who had not raised any such objection in the Trial Court and had obtained a decision on the merits in their favour, were anxious to have the dispute concluded by a pronouncement on the merits of the controversy by this Court. The Bench, however, notwithstanding the terms of the Judgment of the 12th February, 1906, and inspite of what had happened in the Trial Court and what the litigant parties anxiously desired in this Court, proceeded to deal with the question of the maintainability of the suit, came to the conclusion that the suit was barred under section 103 of the Civil Procedure Code of 1882 and dismissed it on that ground. Fletcher J. stated explicitly that as the point was one for which the plaintiffs themselves were not responsible, he thought there should be no order for the costs of the appeal. The plaintiffs, thus baffled in their search after justice, have applied to me to rescind the order made by Sir Francis Maclean and myself on their appeal on the 12th February, 1906, so that the appeal may be restored and heard on the merits. I feel no doubt that the application should be granted in the interests of justice.

I am not called upon to consider the correctness of the decision of Fletcher and Richardson JJ. I assume for the purposes of this application that the order was right and appropriate. The position thus is that the matter in controversy between the parties has never been decided by this Court—not in 1906, because we were of opinion that it could be investigated by a separate suit, not in 1915 because another Division Bench of this Court took the view that the matter could not be investigated in a separate suit. The parties are in no way to blame for the embarrassing situation in which they now find themselves. The judgment of Sir Francis Maclean makes it abundantly clear that the suggestion first came from the Court that the matters in dispute should be investigated in a separate suit, and, as might be expected, it was accepted by both the parties. The result was that the appeal was not heard on the merits. This course was adopted on the assumption that the question could be investigated in a separate suit. That anticipation has not been realised. In such circumstances, the Court has inherent power to vacate the order to enable it to discharge the duty cast on it as a Court of

Justice to determine the controversy between the parties. It would constitute a just reproach to the administration of justice by this Court if a litigant were sent from post to pillar and from pillar to post without even ultimately obtaining a hearing on the merits of his case. In the events which have happened here, the maxim applies *actus curiae neminem gravabit*, an act of the Court shall prejudice no one. This maxim is, in the language of Cresswell J. in *Freeman* v. *Tranah* (1), founded upon justice and good sense and affords a safe and certain guide for the administration of the law. It is the duty of a Judge to try the causes set down for trial before him and the failure of the Court to decide a case after submission, cannot be permitted to defeat the substantial rights of a litigant. There is thus no escape from the conclusion that the order made by Sir Francis Maclean and myself on the 12th February, 1906 should be vacated.

The opposite party has laid stress on the delay which has taken place in bringing this matter before the Court. The judgment of Fletcher and Richardson, JJ. was pronounced on the 4th June, 1915. The application was ready on the 20th December, 1915, though it was not actually moved before me till the 1st September 1916. Mr. Dwarkanath Chakrabarti, who was in charge of the matter, has explained that though the papers were made ready, he really found it difficult to advise his clients as to the appropriate procedure, in view of the extraordinary circumstances of the case, which he added, were unique in his long experience. He further stated that an additional difficulty was created by reason of the fact of the establishment of the High Court at Patna. Finally, the matter was mentioned to me in Court much earlier than the date on which it was actually heard. In all these circumstances, I thought that a rule should be issued and I have heard nothing to change my opinion.

The result is that the rule is made absolute and the order of the 12th February, 1906 revoked. The consequence will be that Appeal from Order 495 of 1904 will stand restored to the file of this Court as an undisposed of appeal and will be heard by such Bench as may be appointed by the Chief Justice by virtue of the authority vested in him.

As regards the costs of this rule, it has been argued by the opposite party that they are not responsible for what has happened; that they have been throughout ready and willing to submit to a decision on the merits by this Court, both in the appeal from

(1) (1852) 12 C. B. 406.

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original order and in the appeal from original decree; and that in view of the peculiar circumstances of the case, they were bound to enter appearance in this rule. There is much force in these contentions and they point to the conclusion that the opposite party should have the costs of this rule. We assess the hearing fee at five gold mohurs.

The records will be retained in this Court till the final disposal of the appeal.

A. T. M. *Rule made absolute.*

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.

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July, 2, 3, 4, 7.

PITAMBAR CHANDRA SAHA CHAUDHURI AND ANOTHER
v.
NISIKANTA SAHA.*

Burden of proof—Hindu Law—Migration—Law of place—Presumption—Succession and family relation—Mixture of customs and ceremonies.

A Hindu family residing in a particular province of India is presumed to be governed by the law of the place where it resides: *Ram Das* v. *Chandra* (1). But where a Hindu family is shown to have migrated from one province to another, the presumption is that it carried with it the law and custom as to succession and family relation prevailing in the province from which it came: *Parbati* v. *Jagadis* (2), and *Seerendro* v. *Heeramonee* (3). This presumption however, is rebuttable by proof that the family has adopted the law and usage of the place to which it has migrated: *Govind* v. *Radha* (4) and other cases referred to.

The Brahmans and Kayasthas of Bengal migrated from Kanauj and originally brought with them the Mithila law; it was after their settlement in Bengal, that the Dayabhaga School of Hindu Law was founded by Jimutavahana about the 14th century and that is the law which now governs the Hindu population of that province even though they may have originally migrated from North Behar. Consequently a party asserting migration from Behar, would have to establish, not merely that the family migrated from Behar, but that the migration took place after the foundation of the Bengal School of Hindu Law by the author of the Dayabhaga.

*Appeals from Original Decrees Nos. 134 and 330 of 1917, against the decision of Babu Asutosh Gupta, Subordinate Judge of Dinajpore, dated the 5th May, 1917.

(1) (1892) I. L. R. 20 Calc. 409.
(2) (1902) I. L. R. 29 Calc. 433; L. R. 29 I. A. 82.
(3) (1868) 12 M. I. A. 81; 10 W. R. P. C. 35: 1 B. L. R. P. C. 26.
(4) (1909) I. L. R. 31 All. 477.

The evidence to support a case that a family has conformed to religious or social rites and usages consistent with the Mitakshara law, may strengthen the case of a person alleging migration from Behar: *Soorendra* v. *Heeramonee* (1) referred to.

A mixture of customs and ceremonies can be of no assistance to the party seeking to establish the applicability of a personal law not prevalent in the locality: *Raj Chunder* v. *Goculchund* (2) referred to.

Appeals by the Plaintiffs.

Suit for recovery of immovable property.

The material facts appear from the judgment.

Dr. Sarat Chandra Basak, Babus Prafulla Chandra Nag, Indu Bhusan Biswas and *Pramatha Nath Banerjee* for the Appellants.

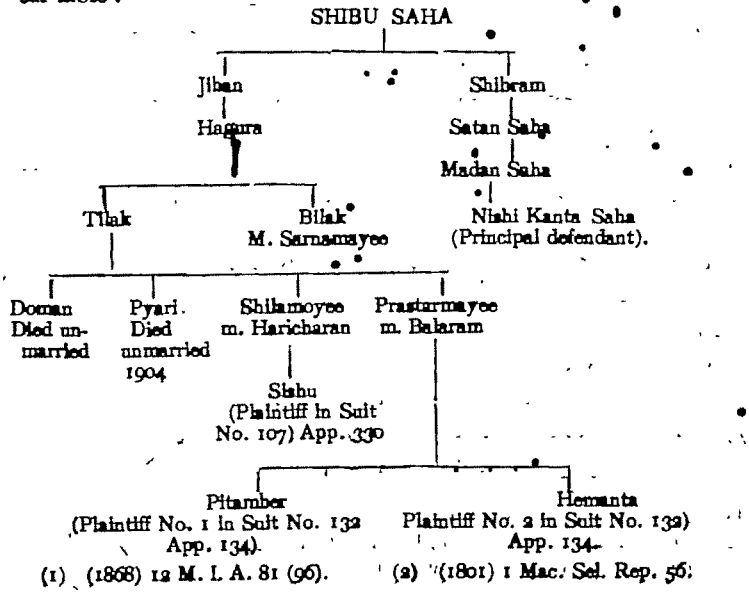
Dr. Dwarka Nath Mitter, Babus Narain Chandra Kar and *Debendra Nath Mandal* for the Respondents.

C. A. V.

August, 26.

The judgment of the Court was delivered by

Mookerjee, J.:—The subject matter of the litigations which have resulted in these two appeals is the estate of one Peary Mohan Saha Chowdhury who died unmarried on the 18th February, 1904. He left two step-sisters Shilamayee and Prastarmayee. The former has a son Sisukumar Saha, the latter has two infant sons Pitambar Chandra Saha and Hemantakumar Saha. The rival claimants to the estate are, on the one hand, these three nephews of the deceased, and, on the other hand, the great-great-grandson of the great-great-grand-father of the deceased, by name Nishikanta Saha. The relationship between the parties appears from the following genealogical table:—



(1) (1868) 12 M. I. A. 81 (96).

(2) (1801) 1 Mac. Sel. Rep. 56.

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The two sons of Prastarmayee have instituted one of these suits for recovery of two-thirds share and the son of Shilamayee has instituted the other suit in respect of the remaining one-third share. The contest thus is between the sisters' sons on the one hand, and the great-great-grand father's great-great-grandson on the other hand. If the family is governed by the Dayabhaga law, the plaintiffs are the preferential heirs; if the family is governed by the Mitakshara law, the defendant is entitled to succeed. The cardinal question in controversy, consequently, is, whether the family is governed by the Dayabhaga law as the plaintiffs allege or by the Mitakshara law as the defendant asserts. There was also a controversy in the Court below as to whether the defendant was at all a member of the family. Upon that point, as also upon the question of the personal law applicable to the parties, the Subordinate Judge has found against the plaintiffs. The plaintiffs have appealed to this Court and have assailed the decision of the Subordinate Judge upon both the matters. As regards the question of relationship, we are of opinion that the conclusion of the Subordinate Judge is amply supported by the evidence on the record. We shall consequently proceed to deal with the question of the personal law which governs the parties in matters of inheritance.

The plaintiffs assert that the family is governed by the Dayabhaga law; the defendant alleges that the family migrated from Behar, where the Mitakshara law prevails and that, notwithstanding migration into Bengal, the members of the family have adhered to the law of their origin. The Subordinate Judge has accepted the contention of the defendant.

Before we proceed to examine the evidence on the record, it is desirable to consider how the question should be approached, as there has been considerable discussion at the Bar upon the subject of burden of proof. It is well-settled that a Hindu family residing in a particular province of India is presumed to be governed by the law of the place where it resides. *Ram Das* v. *Chandra Dassia* (1). But where a Hindu family is shown to have migrated from one province to another, the presumption is that it carried with it the laws and customs as to succession and family relation, prevailing in the province from which it came. *Parbati Kumari* v. *Jagadis Chunder* (2); *Soorendro Nath* v. *Heeramonee* (3). This presumption, however, is rebuttable by proof that the family has adopted the law and

(1) (1892) I. L. R. 20 Calc 409.
(2) (1902) I. L. R. 29 Calc. 433; L. R. 29 I. A. 82.
(3) (1868) 12 M. I. A. 81; 10 W. R. P. C. 35; 1 B. L. R. P. C. 26.

usages of the place to which it has migrated: *Govind Chandra* v. *Radha Kristo* (1). *Jagannath* v. *Narayan* (2); *Mailathi* v. *Subbaraya* (3); *Kulada Prasad* v. *Haripada* (4).

We start then with the position that as the family is resident in the district of Dinajpore in the Presidency of Bengal where the Dayabhaga law prevails, the presumption is that the family is governed in matters of succession by that law. This presumption may be rebutted by proof that the family migrated from a province where the Mitakshara law prevailed. The case developed in the evidence is that the family migrated from Behar, but no such statement was explicitly made in the written statement of the defendant. There is no evidence, direct or indirect, that this family did migrate from Behar. No evidence is forthcoming as to the original place of residence or as to the time when the alleged migration took place. This is not a matter for surprise. The family is not of sufficient importance to have preserved a history of its antecedents or movements; the origin of the family is unknown, its original place of residence is unascertainable, and the time when the family may have moved from one place to another is equally uncertain. The assertion of the defendant that the migration took place during the time of his grandfather is not corroborated by independent evidence, and if true, would tend to cast doubt upon his connection with this family as a member of the junior branch. Besides, if the alleged migration was an event of so recent a date, confirmatory evidence, oral or documentary, might have been expected. There is this further difficulty that even if tangible evidence of migration had been available, the time of migration would be a vital point for consideration. It is a historical fact that the Brahmins and Kayasthas of Bengal migrated from Kanauj and originally brought with them the Mithila law; it was after their settlement in this province, that the Dayabhaga school of Hindu law was founded by Jimutavahana about the 14th century (Jolly, Tagore Lectures 22; Sarbadhikari, Tagore Lecture 403), and that is the law which now governs the Hindu population of this Presidency even though they may have originally migrated from North Behar. Consequently, the defendant would have to establish, not merely that the family migrated from Behar but that the migration took place after the foundation of the Bengal School of Hindu law by the author of the Dayabhaga. There is no trace of evidence on the record to

(1) (1909) I. L. R. 31 All. 477. (2) (1910) I. L. R. 34 Bom. 553.
(3) (1901) I. L. R. 24 Mad. 650.
(4) (1912) I. L. R. 40 Calc. 407 (416); 16 C. L. J. 311.

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enable the defendant to meet this requirement. The fundamental fact, which if proved, would have shifted the burden of proof from the defendant thus remains unestablished. The burden consequently lies upon the defendant to prove that the family is governed in matters of succession by the Mitakshara law. This burden may be discharged by proof of instances of succession consistent with the Mitakshara law and inconsistent with the Dayabhaga law. The evidence to support the case that the family has conformed to religious or social rites and usages consistent with the Mitakshara law and inconsistent with the Dayabhaga law may also strengthen his case, because as was pointed out by the Judicial Committee in the case of *Soorendronath* v. *Heeramonee* (1), there is in Hindu law a close connection between their religion and their succession to property. We shall proceed now to scrutinise the evidence from this standpoint.

The first instance given by the defendant to prove devolution of property according to the Mitakshara is that of Doman. The family priest Bisnu Dutt asserts that after the death of Doman, his agnate Gobardhan took his property to the exclusion of Chandramohan, the son of his sister Bhagyamani. But Chandramohan completely demolishes this case and proves that he succeeded to the estate of his maternal uncle. This is corroborated by rent receipts of which the genuineness has been established by the evidence of Manindra and Nisikanta. This instance supports the theory of the applicability of the Dayabhaga law.

The next instance relates to the property of Radha Chaudhuri. Bisnu Dutt states that Madan, the agnate of the deceased, took to the exclusion of the daughter's son Kamalakanta, but he admits that Madan lived in a separate house. If this be true, whether the Mitakshara or the Dayabhaga applies, Madan as a cousin was not entitled to succeed, notwithstanding the assertion of Bisnu Dutt that an agnate even though separate, under the Mitakshara law, takes in preference to the daughter's son. Nor is there any tangible evidence to support the allegation that Radha Chaudhuri had jotes which Madan took by inheritance and sold to Balaram.

The next instance cited is that of Amrita Saha whose property is said to have been inherited by his agnatic nephew Pabana in preference to his daughter Kalamani and his daughter's son Kandura. This instance is fictitious. Paban was separate from his uncle and was not a preferential heir even according to the Mitakshara. It is doubtful whether Amrita left any land, but

(1) (1868) 12 M. I. A. 81 (96).

whatever property he had, passed to his daughter Kalamani according to the testimony of Chandramohan and Manindra.

The next instance mentioned is that of Belku, whose property, according to Bisnu Dutt, was inherited by his agnatic cousin Jhulu in preference to his wife, daughter and mother. There can be no foundation for this statement, as Jhulu could have no claim to supersede the wife, daughter and mother, either by right of survivorship or by right of inheritance, according to the Mitakshara or the Dayabhaga.

Another instance adduced is that of Umakanta, whose property is said to have been inherited by his agnate Sudhap in preference to his sister's sons Lakshmi and Sitaram. But according to Kamallochan and Nisikanta, Sudhap was the son of Gokul who was the brother of Umakanta. The instance is consequently consistent with the Dayabhaga.

The next instance brought forward is that of Mathur whose estate is said to have been inherited by his agnate Balia in preference to Nandahari, the son of his sister. But Nisikanta admits that Mathur had no land, and, according to Manindra, Mathur was a leper and had no property. There is good reason to hold that this instance is spurious, specially as Balia who is alive has not been called.

The next instance offered is that of Naba Saha, whose estate is said to have been inherited by his mother in preference to his daughters. But a mother cannot inherit in preference to a daughter under either the Mitakshara or the Dayabhaga.

The next instance is that of Atmaram, whose estate is alleged to have been inherited by his agnatic nephew Chandramohan, in preference to his daughters Ano, Jano and Bhanga. Nisikanta is the son of Ano, and Tepa the son of Bhanga. Nisikanta is not corroborated on this point and is obliged to admit that Chandramohan was separate from Atmaram when he succeeded to the estate of the latter by inheritance. The principle of survivorship had consequently no application, and, even according to the Mitakshara, the daughters were preferential heirs to the separated agnatic nephew. The instance is probably spurious, as Nisikanta admits that Atmaram left no land.

The next instance is that of Laban whose estate, it is alleged, was taken by his nephew, living in commensality with him, in preference to his widow. Bhairab, one of the nephews, has been examined for the defendant, and admits that Madhab, the elder brother of Paresmani, the widow of Laban, managed the property of

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Paresmani. This seems to indicate that she inherited her husband's estate, though she lived sometimes jointly with, sometimes separate from, her husband's co-sharers.

The next instance is that of Dhanapati whose estate is said to have been taken by his brothers in supersession of his widow. Bhairab attempts to prove this, but breaks down in cross-examination. Dhanapati predeceased his father and his childless widow could not inherit either according to the Mitakshara or the Dayabhaga.

These instances, adduced by the defendant, do not help his case in the least. On the other hand, some of them have the appearance of inventions based upon an inaccurate knowledge of the Mitakshara law. We pass on to some instances relied upon by the plaintiffs.

The plaintiffs lay stress upon the case of Swarnamayi, the widow of Bilak, the paternal uncle of Pearymohan whose estate is in dispute. Bilak was joint with his brother Tilak, and yet his estate was taken by Swarnamayi. Her name was registered under the Land Registration Act in place of her deceased husband, Bilak. After the death of Swarnamayi, the name of Tilak was registered as the next reversioner by right of inheritance. This is supported by the deposition of Tilak in the Land Registration case and is strengthened by the registered Kabuliat executed by Morad Baksh in favour of Tilak and Swarnamayi on the 18th September, 1885. The balance of oral evidence is undoubtedly in favour of this instance. The defendant was consequently driven to start the story that Tilak was insane, but the evidence on the point is hopelessly contradictory. We may add that in this Court an endeavour was made to negative the effect of this instance by invoking the aid of the theory that specification of shares causes a severance of interest in a family governed by the Mitakshara law and reliance was placed upon the decisions in *Ramparshad* v. *Lakhpati* (1); *Kawl Nain* v. *Budh Singh* (2), and *Musammat Girja* v. *Sadashiv* (3); but such a theory was not started in the Court below, and facts which would have been material to enable the Court to determine the point are not on the record. In our opinion, this instance militates against the view that the family is governed by the Mitakshara law.

The plaintiffs rely upon another instance from the family of Peary, Binod and Lalbihari. They were the sons of Bhuban who had two brothers Sonaram and Balaram. Balaram married Prastarmayi and

(1) (1902) L. R. 30 I. A. 1; I. L. R. 30 Calc. 231.
(2) (1917) 26 C. L. J. 101.
(3) (1916) 24 C. L. J. 207; L. R. 43 I. A. 151; I. L. R. 43 Calc. 1031.

was the father of Pitambar and Hemanta, the plaintiffs in suit No. 132 and appeal No. 134. Sonaram had a son Jagobandhu. Peary married Pratibha. Lalbihari had a daughter Milan-Dasi. Nimai was the nephew of Lalbihari. The case for the plaintiffs is that Pratibha took the estate of her husband Peary in preference to his husband's brother. In support of this view, reliance is placed upon proceedings in two suits which were instituted against the members of the family by creditors. These are consistent, only with the theory that the family was deemed to be governed by the Dayabhaga law. Subsequently Jagabandhu and Balaram separated, while Pratibha, Lalbihari and Binod continued joint. This is sufficiently indicated by the fact that two conveyances were executed one in favour of the heirs of Bhuban, the other in favour of Jagabandhu. An endeavour was made two neutralise the effect of these facts by reliance on the proposition laid down by the Judicial Committee in *Balabux* v. *Rukhmabai* (1), that the separation of one member of a family operates in law as a disintegration of the entire family. That principle could have no application to the present case. The withdrawal of Jagabandhu from the family could not affect the position of the descendants of Bhuban, if the family was governed by the Dayabhaga law. There is no need to assume a separation in law followed by an imaginary reunion amongst them. The evidence conclusively shows that Jagabandhu alone went out of the family leaving unaffected the mutual relation of his cousins as members of a joint Hindu family. This instance is clearly inconsistent with the case of the defendant.

Another instance mentioned by the plaintiffs is that of Hari Dasi, who is said to have succeeded to the estate of her son Gopal living jointly with his brother Ananda. The defendant seeks to minimise the effect of this instance by invoking the aid of the theory that as Gangaram, the brother of Ananda and Gopal, separated, there must have been a complete disruption of the family. But the fact remains that Gangaram left the family during the life time of his father, that Gopal and Ananda remained joint with their father and that after his death the two brothers remained joint till Gopal died.

The last instance relied upon by the plaintiffs is that of Chandramohan who succeeded to the estate left by his maternal uncle Doman. The assertion of Bisnu Dutt that the property passed to Gobordhan, an agnate of Doman, is not corroborated by independent testimony. On the other hand, the allegations of Chandra-

(1) (1903) I. L. R. 30 Calc 725 ; L. R. 30 I. A. 130.

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mohan are confirmed by a long series of rent receipts which are undoubtedly genuine and prove his possession.

It is thus plain that of the four instances mentioned by the plaintiffs, the first and fourth are consistent only with the theory that the family is governed by the Dayabhaga law; the second and third instances also point to the same conclusion, unless we adopt the theory of the defendant that in each of those cases there was a separation in law, though the parties in fact continued joint. But even on that view, the only result is that the instances become neutral; they become consistent with either school of law and do not advance the case of the defendant that the family is governed by the Mitakshara law.

Here we may mention that stress has been rightly laid by the plaintiffs on the circumstance that succession certificates have been repeatedly taken out where a succession certificate would be needless if the parties were governed by the Mitakshara law: *Beejraj* v. *Bhyropersaud* (1); *Pateshuri* v. *Bhagwati* (2); *Jagmohandas* v. *Allu* (3); *Subramanian* v. *Rakku* (4). Amongst relevant instances may be mentioned the following. After the death of Tilak in 1898, the defendant Nisikanta who was then in the employ of Balaram, took a guardianship certificate for the infants Doman and Peary and a succession certificate on their behalf. After the death of Doman, three years later, Nisikanta took out another succession certificate on behalf of Peary. After the death of Peary, Nisikanta applied for a succession certificate as his heir. The certificate so granted was revoked at the instance of Sisukumar as soon as he attained majority. After the deaths of Binod and Pratibha, Lalbihari took out three succession certificates. Hiramani, the widow of Dhanapati, took out succession certificates on behalf of Jogendra and his minor brother, after the death of their mother, for collection of debts. These instances converge to the conclusion that the parties are governed, not by the Mitakshara but by the Dayabhaga Law.

The inference deducible from the instances of succession and the grant of succession certificates is in no way weakened by the evidence of alleged peculiarities in religious and social ceremonies, which are said to be consistent with the Mitakshara and inconsistent with the Dayabhaga. The parties, no doubt, have employed a Maithili Brahmin as their priest. This, however, is by no means conclusive, and he admits that he uses books on ceremonial matters, which are in use in Bengal, as Hindu Satkarmamala and Purohit

(1) (1896) I. L. R. 23 Calc. 912.
(2) (1895) I. L. R. 17 All. 578.
(3) (1894) I. L. R. 19 Bom. 338.
(4) (1897) I. L. R. 20 Mad. 232.

Darpan. The evidence as to the performance of special ceremonies is of an entirely inconclusive character. In connection with marriages, a ceremony called the ring-ceremony is mentioned which consists in the sprinkling of vermilion as soon as a marriage proposal is finally settled. The evidence shows that this is common amongst Bengal Telis and is not peculiar to Maghya Telis (the sect to which the defendant claims that the family belongs). The only peculiarity alleged is a conversation carried on ostensibly for the purpose of ensuring that the marriage is not contracted with a person outside the sect. Other ceremonies stated to be prevalent are Astamangal, Kankanbandhan, Telhalud, Patrakaran, Nandimukh, Satpak, Maladan, Basor, Kusundika and Saptapadigaman. But it is plain that these are in vogue equally amongst Bengal Telis. Indeed, some of them such as the Nandimukh Sradh on occasions of marriage and rice ceremony, Saptapadigaman at the time of the marriage ceremony and the Yajna, are obligatory under both the Dayabhaga and the Mitakshara School. Some stress was laid on the period of impurity resulting from the death of a relation and the defendant sought to prove that the Sradh was performed on the 32nd instead of the 31st day. The attempt was futile, because the same period of impurity is prescribed by the Bengal and Benares Schools. The evidence of Bisnu Dutt is on these matters singularly unreliable; he has endeavoured to substantiate imaginary differences in religious and ceremonial matters between the two schools which have no real existence. But his attempt in this direction has been quite as futile as in the case of instances of succession which were alleged to be in conformity with the one school and not the other. It may be a matter for argument whether this is due to his ignorance or is a deliberate departure from truth; in any view, we cannot place the same reliance upon his assertions as the Subordinate Judge did.

It is worthy of note that whatever differences may or may not exist in matters ceremonial, there are several instances of the performance of Sradhs by persons who were entitled to the property of the deceased according to the Dayabhaga School. Thus, Sisukumar performed the Sradh of Peary. Dharani the daughter's son of Gangaram performed his Sradh and the estate was inherited by his mother. Bhairab had to admit that on the death of his own agnatic cousin Bigaroo, the widow performed the Sradh, although he himself and other agnates were present at the time of his death.

An attempt has been made to show that the Magiya Telis are of the same class as Purnea Telis and that there is social intercourse between the two sects. There is no reliable evidence in support of

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this assertion. On the other hand, the evidence indicates that an attempt at such intercourse on the occasion of a marriage in the family of Madhab led to acute caste disputes. The truth seems to be that there may have been some commingling of customs, as Purnea in Behar and Dinajpur in Bengal are not separated by an impossible barrier. But as pointed out by the Sadar Court in an early case, such mixture of customs and ceremonies can be of no assistance to the party seeking to establish the applicability of a personal law not prevalent in the locality: *Rajchunder* v. *Gocul-chund* (1). Reference may in this connection be made also to *Chundra* v. *Nobin* (2); *Ram Bromo* v. *Kaminee* (3); *Junaruddeen* v. *Nobin* (4); *Abaneswari* v. *Kissen* (5); *Sonatun* v. *Ruttun* (6); *Pirthee Singh* v. *Sheo* (7); *Bhagabati* v. *Sahudra* (8); *Kulada* v. *Haripada* (9); *Govind* v. *Radha* (10); *Jagannath* v. *Narayan* (11); *Soorendro* v. *Heeramonee* (12); which reversed the decision of Trevor Seton-Karr and Jackson, JJ. in *Heeramonee* v. *Nuffaree* (13). If we apply the principle deducible from these cases, it is plain that the defendant has failed to discharge the burden which rested on him, namely, to prove that the family came from a province where the Mitakshara law prevailed, into Bengal and that it has adhered to the Mitakshara law in matters of succession. But we may add that even if the family be assumed to have migrated into Bengal and to have retained some of its religious rites and ceremonies, the evidence points to the conclusion that the family has acquired a course of devolution of property in accordance with the common course of descent of property in the district under the Bengal School of Hindu Law. In either of these views, the defendant cannot successfully resist the claim of the plaintiffs.

The result is that these appeals are allowed and the decrees of the Subordinate Judge set aside. The suits are decreed in respect of the immovable properties mentioned in the schedules to the plaints. The claim to movables is dismissed, as we agree with the Subordinate Judge in his finding that the plaintiffs have failed to establish their claim to the movables; the evidence in regard to the alleged movables and their values is scanty and unsatisfactory. The plaintiffs will be entitled to half their costs in both the Courts.

A. T. M. *Appeals allowed.*

(1) (1801) 1 Macn. Sel. Rep (56.)
(2) (1865) 2 W. R. 197.
(3) (1866) 6 W. R. 295
(4) (1862) Marshall. 232.
(5) (1868) 4 Wyman 226.
(6) (1864) W. R. Sp. No. 95.
(7) (1867) 8 W. R. 261.
(8) (1911) 16 C. W. N. 834.
(9) (1912) 16 C. L. J. 311.
(10) (1909) I. L. R. 31 All. 477.
(11) (1910) I. L. R. 34 Bom. 553.
(12) (1868) 12 M. I. A. 81.
(13) (1862) 1 Hay. 292.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.

SADHU CHARAN ROY CHOWDHURY AND OTHERS

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER.*

CIVIL, 1919. June, 24, 25.

Land acquisition—Land Acquisition Act (I of 1894), Sec. 23, Sub-sec. (1) cl. (1) —Value of land—Market value of land—Tenant-at-will, interest of.

The value of land acquired under the Land Acquisition Act, should ordinarily be determined as a whole and the question of apportionment of the compensation awarded amongst claimants of different degrees should thereafter be taken into consideration.

The market value of land is the price when it is offered for sale by one who desires but is not obliged to sell and is bought by one who is under no necessity of having it: *Wernicke* v. *Secretary of State* (1) referred to.

In the determination of the question of market value, a Court has to look to the commercial value rather than to abstract legal rights: *Bombay Improvement Trust* v. *Jalbhoy* (2) referred to.

Though the interest of a tenant may be so precarious that he and his transferee may be compelled to leave the land at the will of the superior landlord, his interest cannot be said to have no market value.

Appeals by Claimants in the land acquisition case.

The material facts appear from the judgment.

Babus Dwarka Nath Chuckerbutty, Biraj Mohan Majumdar and *Madhub Gobind Roy* for the Appellant in Appeal No. 19.

Mr. Pugh, Babus Joges Chunder Roy, Ramani Mohan Chatterjee and *Pramatha Nath Banerjee* for the Appellant in Appeal No. 40.

Babus Ram Charan Mitra and *Sris Chandra Chowdhry* for the Respondents in Appeals Nos. 19 and 40.

Babus Joges Chunder Roy and *Ramani Mohan Chatterjee* for Appellant in Appeal No. 41.

Babus Ram Charan Mitra, Sris Chunder Chowdhry, Gopal ader Das and *Madhub Gobinda Roy* for the Respondent in l No. 41.

judgment of the Court was delivered by

erjee, J.:—These appeals are directed against the award June, 25.
Land Acquisition case in respect of land acquired at

from Original Decrees Nos. 19, 40 and 41 of 1918, against the Sells Esq., Additional District Judge of Pabna and Bogra, dated 1917.

C.-W. N. 1046.

(1) (1909) I. L. R. 33 Bom. 483.

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Sadhu Charan v. The Secretary of State for India in Council.
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Serajgung for the purpose of the Sara-Serajgung Railway. We are concerned in these appeals with two sets of claimants—one is a tenure-holder (Hem Chunder Chowdhury) and the others are sub-tenants, described as merchant-tenants, in actual occupation of the lands acquired. The appeal preferred by the Roy Chowdhuries, the merchant-tenants, relates only to one plot of land. The appeal preferred by the Chowdhury tenure-holder includes that parcel as also other parcels of land. We shall at this stage consider the parcel of land included in the appeal by the merchant-tenants and if the other lands included in the appeal preferred by the tenure-holder require separate consideration, we shall discuss the matter hereafter.

The question before this Court is the determination of the market value of the land acquired, within the meaning of section 23, sub-section 1, clause (1) of the Land Acquision Act. It has been pointed out in judicial decisions in Bombay and in this Court, *Collector of Belgaum* v. *Bhimrao* (1); *Bombay Improvement Trust* v. *Jalbhoy* (2); *Government of Bombay* v. *Esufali* (3); *Dunia Lal* v. *Gopi Nath* (4), that the value of land should ordinarily be determined as a whole and the question of apportionment of the compensation awarded amongst claimants of different degrees should thereafter be taken into consideration. This view, however, has not always been accepted in practice and the procedure adopted in the case before us has been followed as a matter of convenience; namely, that the market value of the interests claimed by persons who hold interests of different degrees in the property acquired has been determined, successively and independently of each other. Now what is the market-value either of the land as a whole or of a specific interest in the land acquired? Reference may usefully be made to the two definitions given in two of the reported cases, the cases of *Bombay Improvement Trust* v. *Jalbhoy* (2) and *Kailas Chandra* v. *Secretary of State for India* (5). In the former c the market value of land was stated to mean the price which w be obtainable in the market for that concrete parcel of land wi particular advantages and its particular drawbacks, both the a age and the drawback being estimated rather with reference t mercial value than with reference to any abstract leg

(1) (1908) 10 Bom. L. R. 657.
(2) (1909) I. L. R. 33 Bom. 483; 11 Bom. L. R. 674.
(3) (1909) 12 Bom. L. R. 34 (51); I. L. R. 34 Bom. 618.
(4) (1895) I. L. R. 22 Calc. 820.
(5) (1910) 17 C. L. J. 34.

In the second case the market value of land was described as the price that an owner willing and not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for the sale and purchase of the land; in other words, the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell and is bought by one who is under no necessity of having it: *Wernicke* v. *Secretary of State* (1).

Now, let us determine the market value of the interests of the tenure-holder and the sub-tenants under him in the case before us. The land acquired falls into two classes. One portion of about 4 bighas and 2 cottas is described as Bazar land and the remainder about 6 bighas and 5 cottahs is described as back land. As regards land of former class, which has a frontage of 385 cubits and is also described as front land, the Collector has awarded to the tenure-holder the capitalised value of the rent actually recovered by him from the sub-tenants. It has been contended before us on behalf of the tenure-holder that this is not adequate. On the other hand, on behalf of the Secretary of State, we have been pressed to take the view that the sum awarded is really more than adequate. It is pointed out that some years ago when the tenant in occupation transferred his interest in the land to the present occupant, the rent was increased from 4 annas a cubit to 6 annas a cubit; that is, from Rs. 24 a bigha to Rs. 36 a bigha. The senior Government pleader has contended that it is not probable that the rent can be further increased and that consequently the capitalised value of the present rent, which is the rent actually levied for more than 10 years, is adequate compensation to the tenure-holder. This argument may be conceded to be not without weight, but it does not take into account one important element in the case. When the rent was enhanced from 4 annas a cubit to 6 annas a cubit, a premium was paid by the new tenant to the landlord, at the rate of Rs. 192 a bigha, in other words, the landlord at the time took the premium and did not claim a higher rent as he might well have done if premium had been paid. Consequently, it is not sufficient to give to the tenure-holder the capitalised value of the rent as then reserved. In our opinion the amount awarded to him should be increased by Rs. 192 per bigha. In respect of the back land, which is described as agricultural land, the award has been made on the basis of the rent at present levied, namely, Rs. 10 per bigha. The tenure-holder does not claim any additional amount on account of this land.

(1) (1909) 1 W. N. 1046.

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We have now to take into consideration the case of the merchant-tenants. The Court below in concurrence with the Collector has not awarded them any compensation. The ground for this decision is that the tenancies of these persons are of so precarious a nature, that they cannot be deemed to have any market-value. It has been found on the evidence that the merchant-tenants are tenants at will and that they have no transferable interest in the land. They may at any time be called upon by the tenure-holder to leave the land; and if they transfer the land, the transferee is not entitled to retain possession against the wishes of the superior landlord. In our opinion, these facts do not necessarily justify the conclusion that the interest of these merchant-tenants has no market-value. It is conceivable that under the circumstances mentioned no buyer can be found in open market for these lands: and if that had been established as a fact the position might well have been maintained that their interest has no market-value. But as was pointed out in the case of *Bombay Improvement Trust* v. *Jalbhoy* (1), in the determination of the question of market-value we have to look to the commercial value rather than to abstract legal rights. It has been established by the evidence beyond the possibility of a doubt that although the interest of these merchant-tenants is so precarious that they themselves and their transferees may be compelled to leave the land at the will of the superior landlord, still their interest in the land is frequently sold and substantial prices are paid by the purchasers. The purchasers thereupon approach the landlord and get his consent to the sale, sometimes upon payment of premiums and sometimes upon payment of increased rent. In these circumstances it is impossible for us to hold that these merchant-tenants have an interest in land which has no market-value. We are not concerned with the motive which induces the intending purchaser to acquire title to such precarious interests in land. We are concerned with the unquestionable fact that such sales are common; and they are common because purchasers are able in usual course to secure recognition from the landlord. The conclusion appears to us to be inevitable that compensation must be awarded to the merchant-tenants in respect of their interest in the land acquired. Here considerable difficulty presents itself. The case in the Court below was not approached from the point of view which has presented itself to us in this Court and the evidence as to the value realised on the occasion of sales is not only conflicting but of a somewhat doubtful nature. The prices stated in several of the conveyances

(1) (1909) I. L. R. 33 Bom. 483.

includes the value of the interest in the land as also of structures on the properties conveyed and sometimes the value of the good will of the business which was carried on there. In such circumstances, a remand and retrial would ordinarily be inevitable, but the parties have wisely come to the conclusion that no useful purpose would be served by a remand for a fresh enquiry. At their request we have decided to act as assessors ourselves and to make an award on the basis of such materials as are on the record. Our decision is that the merchant-tenants should have, in respect of the bazar lands, Rs. 400 a bigha, and, for the back or agricultural land, Rs. 200 a bigha; to this will be added the usual statutory allowance. As between the Secretary of State on the one hand and the tenure-holders and the merchant-tenants on the other, the costs will be in proportion. As between the tenure-holder and the tenants under him, there will be no order for costs either here or in the Court below.

F. A. 40 of 1918.

One of the plots in this appeal is also the subject matter of appeal No. 19 of 1918, and has already been dealt with in our judgment in that case. We have now to deal with the other plots included in this appeal. The award in favour of the tenure-holder in respect of these plots will be modified according to the rates stated in our judgment already delivered. There will be the same order for costs.

F. A. 41 of 1918.

In this case the compensation granted to the tenure-holder will be increased on the basis of our judgment in F. A. 19 of 1918 Costs will be in proportion. Hearing fee Rs. 200.

A. T. M. *Appeals allowed.*

Before Mr. Justice N. R. Chatterjea, and Mr. Justice Duval.

CIVIL.

1919.

April, 30.
May, 1, 5.

UMED ALI AND OTHERS

v.

NAWAB KHAJE HABIBULLA AND OTHERS.*

Rent, suit for—Talab baki *papers—Evidentiary value—Evidence Act (I of 1872), Secs. 32 (2), 34—Bengal Tenancy Act (VIII of 1885), Sec. 52 (6)—'Time of measurement.'*

Under section 34 of the Evidence Act, *talab baki* papers are not sufficient evidence to charge any person with liability.

Talab baki papers may be evidence under section 32 Cl. (2) of the Evidence Act; but before they can be admitted, a landlord is to show that the person making the statement is dead and the entries are made by him in the ordinary course of business.

The words "At the time the measurement on which the claim is based was made" in sub-section 6 of section 52 of the Bengal Tenancy Act, do not refer to the measurement upon which the excess area is found out before the institution of the suit but refer to the measurement made at the time of the original settlement.

A landlord has to prove under section 52 of the Bengal Tenancy Act, that there has been an increase in the area for which rent was previously paid and in order to do so, he must show that the land was measured at the time of the inception of the tenancy by a particular standard of measurement and that there has been an increase in the area on measurement by the same standard. The section merely provides that if the landlord proves that at the time the measurement on which the claim is based was made, there existed a practice of settlement being made after measurement of the land assessed with rent, it may be presumed that the area specified in the patta, kabuliat or counterfoil rent receipt was entered in it after measurement, so that if the landlord can prove such a practice, it will be presumed that the area entered in the patta, kabuliat or rent receipt was entered after measurement, though he is not able to prove that as a matter of fact the lands in the particular case were settled after measurement: *Uma Singh* v. *Turini* (1) referred to.

Appeals by the Defendants and Plaintiffs respectively.

Suits for recovery of rent and also for enhancement of rent on the ground of a rise in the prices of staple food crops.

The material facts appear from the judgment.

Babu Rames Chandra Sen for the Appellant in appeals Nos. 1244 and 1523 to 1529.

* Appeals from Appellate Decrees Nos. 666, 890, 1209, 1214, 1244, 1486 to 1491, 1523 to 1529 of 1916, against the decision of Babu Surendra Nath Ghose, Subordinate Judge, and Court of Tipperah, dated the 24th November, 1915, modifying that of Babu Hem Chandra Das Gupta, Munsiff, 1st Court, at Chandpur, dated the 18th November, 1914.

(1) (1913) 19 C. L. J. 451 (452).

Babu Surendra Nath Guha for the Respondents.

Babu Surendra Nath Guha for the Appellants in appeals Nos. 1209, 1486 to 1491.

Babu Ramesh Chandra Sen for the Respondents.

Babu Surendra Nath Guha for the Appellants in appeals Nos. 666, 890 and 1214.

Babu Jatindra Mohan Ghose for the Respondents in No. 666.

Babu Birendra Chandra De (for *Babu Gopal Chandra Das*) for the Respondents in No. 890.

No one appeared for the Respondents in No. 1214.

The judgments of the Court were as follows :

May, 5.

S. A. Nos. 1244, 1523 to 1529 of 1916 :—These appeals arise out of suits for recovery of rent and also for enhancement of rent on the ground of a rise in the prices of staple food crops.

The defence was that the rent was not liable to enhancement and the defendants relied upon the presumption under section 50 of the Bengal Tenancy Act.

The learned Subordinate Judge says :—"The defendants have not exhibited their dakhilas. They, however, rely upon the plaintiffs' paper to show that their jamas have not been altered for the last 20 years. But I do not think that the presumption under section 50 of the Bengal Tenancy Act can help the case for the defence in any way, for the presumption has been rebutted by the plaintiffs. The *talab baki* of 1281 goes to show that the jamas originally payable by the defendants were altered in that year."

It is contended before us that *talab baki* papers are merely corroborative and not independent evidence. No doubt, under section 34 of the Evidence Act, such papers are not sufficient evidence to charge any person with liability. There is divergence of judicial opinion however upon the question whether the papers sought to be used for rebutting the presumption under section 50 (as in the present case) can be said to be used for the purpose of charging a person with liability. It has been held in some cases that they are not. See the cases of *Belait Khan* v. *Rash Behary Mookerjee* (1), *Dukha Mandal* v. *W. N. Grant* (2). A contrary view has been taken in other cases : see *Surnomoyi* v. *Jahur Mahomed Nasyo* (3) and also in the latest case on the point, namely, the case

(1) (1874) 22 W. R. 549.
(2) (1912) 16 C. L. J. 24.
(3) (1882) 10 C. L. R. 545.

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of *Ahiswi v. Tarak Nath Ghosi* (1). The plaintiffs have proved that the papers of 1281 were prepared by same agent of theirs and that they were in the handwriting, and bear the signature, of the said agent; but there is no evidence to show whether the person is alive or dead. If the person is dead, the papers may be evidence under section 32 clause (2) as being the statements of a deceased person made in the ordinary course of business. The defendants did not take any objection to the admissibility of these papers in the Courts below, and in fact they relied upon these papers for a period of 20 years immediately preceding the suit. They now take objection to the admissibility of the papers of 1281 which show that there was variation of the rent in that year. In order, however, that the papers might be evidence under section 32 clause (2), it was for the plaintiff to show that the person making the statement was dead and that the entries were made by him in the ordinary course of business before the collection papers could be admitted. Under these circumstances, we think that there should be an inquiry in this matter and that the plaintiffs should be given an opportunity of adducing evidence on this point. If the papers are admissible in evidence under section 32, it would be unnecessary to consider whether they are admissible under section 34.

We accordingly direct the Court below to take any evidence which the plaintiffs may adduce on this point and send up its finding on the point to this Court within one month of the arrival of this order in the Court below. The question whether those papers are admissible in evidence under section 34 of the Evidence Act (if necessary to be considered) and the other question, namely, as to the right of enhancement under section 30 and the date from which the enhancement is to take effect, will be considered after the finding on the above point is received in this Court.

S. A. Nos. 1209, 1486 to 1491 of 1916:—These appeals arise out of the same suits, and the main questions in these cases are first, whether the lower appellate Court has misunderstood the provisions of sub-section 6 of section 52 of the Bengal Tenancy Act and, secondly, whether that Court has erred in not taking into consideration matters which should have been considered under this section in determining the question whether the plaintiffs are entitled to additional rent in respect of additional area.

Section 52, sub-section 6 runs as follows: "When in a suit under this section the landlord or tenant proves, that, at the time

(1) (1912) 16 C. L. J. 328 (333).

the measurement on which the claim is based was made, there existed in respect of the estate or permanent tenure or part thereof in which the tenure or holding is situate, a practice of settlement being made after measurement of the land assessed with rent, it may be presumed that the area of the tenure or holding specified in any potta or kabuliyat, or (where there is an entry of area in a counterfoil receipt corresponding to the entry in the rent roll) in any rent roll relating to it, has been entered in such potta, kabuliyat or rent roll after measurement."

The learned Subordinate Judge was of opinion that the practice of recent measurement would not help the plaintiff. The learned pleader for the appellant contends that the words "at the time the measurement on which the claim is based was made" in sub-section 6 of section 52 refer to the measurement upon which the excess area is found out before the institution of the suit and that it does not refer to the measurement made at the time of the original settlement. We are unable, however, to hold that this is what is meant by the section. The landlord has to prove under the section that there has been an increase in the area for which rent was previously paid and in order to do so, it has been held that he must show that the land was measured, at the time of the inception of the tenancy by a particular standard of measurement, and that there has been an increase in the area on measurement by the same standard. The section merely provides that if the landlord proves that at the time the measurement on which the claim is based was made, there existed a practice of settlement being made after measurement of the land assessed with rent it may be presumed that the area specified in the potta, kabulyat or counterfoil rent receipt was entered in it after measurement. So that if the landlord can prove such a practice, it will be presumed that the area entered in the potta, kabulyat or rent receipt was entered after measurement, though he is not able to prove that as a matter of fact the lands in the particular case were settled after measurement; see the case of *Uma Singh* v. *Tarini Prosad* (1).

If the contention of the appellant were accepted, it would follow that the landlord on showing that there is a recent practice of settlement of land after measurement (which may be stated by the landlord a few years before the suit) would be entitled to ask the Court to presume that there has been such a practice 50 or 60 years before the institution of the suit when the tenancy was created. We do not think that that is the meaning of the sub-section although

(1) (1913) 19 C. L. J. 451 (452).

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the language used makes it somewhat ambiguous. We are accordingly of opinion that so far as the contention is based upon sub-section 6 of section 52, it must be over-ruled.

The learned Subordinate Judge, however, does not deal with the facts of the case bearing on the question of measurement. In the first place he says that the plaintiffs have given evidence as to the recent practice prevailing in the mouzah about the settlement of lands. It has been pointed out to us that the plaintiffs adduced evidence to show that lands had been settled after measurement from the year 1842 and there were produced papers of 1258 and 1280 which are referred to in the judgment of the Munsiff. Besides there appears to have been a survey and settlement of lands in the year 1276. The learned Munsiff appears to have considered the entire evidence bearing upon the question. The lower appellate Court has not come to any finding upon the facts and has practically proceeded upon the proposition of law mentioned in his judgment.

We think, therefore, that the cases should go back to the lower appellate Court in order that the question may be considered and findings arrived at upon the evidence on the record and the appeal disposed of according to law.

Costs to abide the result.

This judgment will govern S. A. Nos. 666 and 890 of 1916, the question in these cases being similar.

S. A. No. 1214 of 1916 :—The respondent has not appeared in this case. This appeal arises out of a suit for enhancement of rent and also for additional rent for additional area.

The holding originally belonged to the defendant's father. There was a subsequent division of the holding into three parts. The learned Subordinate Judge says "It does not appear when the holding in question was created. There is nothing to show that the settlement with the defendants was made on the basis of any measurement or that they have been holding any land beyond the boundaries of the lands let out to them. In short the plaintiffs have failed to prove that the defendants are in possession of any excess land." It appears however from the Munsiff's judgment that the quantity of land and the amount of rent of the original holding have varied from time to time, and that being so, the incidents of the original tenancy would govern the incidents of the three holdings in the possession of the defendants, into which the original holding was sub-divided. In these circumstances we do not see any

(1) (1913) 19 C. L. J. 451 (452).

reason why the plaintiffs should not be entitled to additional rent for additional area.

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The result is that so far as this case is concerned, the decree of the lower appellate Court is set aside and that of the Court of first instance restored.

We make no order as to costs of this Court, but the plaintiffs will be entitled to costs of the Court of appeal below.

Appeals Nos. 1244, 1523 to 1529 of 1916, 1209, 1486 to 1491 of 1916 remanded. Appeal No. 1214 of 1916 allowed.

A. T. M.

Before Mr. Justice Fletcher and Mr. Justice Newbould.

SARIP HOCHAN

v.

TILOTTAMA DEBI.*

CIVIL.
1917.
August, 2.

Notice—Non-service, effect of—Sale, if valid—Bengal Tenancy Act (VIII of 1885), Sec. 158 B (2).

The provision as to giving of notice of application for execution of decree as mentioned in section 158 B (2) of the Bengal Tenancy Act is mandatory and the failure of the Court to serve such a notice affects the validity of sale made in execution of rent decree.

Appeal by the Defendant.

Suit for recovery of possession of a non-transferable occupancy holding.

The material facts appear from the judgment.

Babu Indu Bhusan Roy for the Appellant.

Dr. Jadu Nath Kanjilal for the Respondent.

The judgments of the Court were as follows:

Fletcher, J.:—This is a case that admits of no doubt. The suit was brought by the plaintiff to recover possession of a non-

August, 2.

* Appeal from Appellate Decree No. 710 of 1916, against the decree of H. E. Liddell Esq., Additional District Judge of Backergunge, dated the 1st December, 1915, affirming that of Babu Debendra Chunder Biswas, Munsiff, 3rd Court, at Barisal, dated the 20th March, 1915.

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1917.
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Fletcher, J.

transferable occupancy holding. The defendant was a purchaser at a sale in execution of a decree purporting to be a rent decree obtained under the provisions of section 148 A of the Bengal Tenancy Act. The plaintiff's purchase had prior to the institution of that rent suit under section 148 A been recognized by some of the co-sharer landlords. The co-sharer landlords who did not recognize the plaintiff then instituted the suit for rent against the original tenant and added as defendants the co-sharer landlords who had recognized the plaintiff. A decree was obtained against the original tenant and the property was purported to be sold in execution of that decree, the defendant being the purchaser. The learned Judge in the lower appellate Court has held that the sale in execution under the rent decree did not operate so as to pass the holding to the defendant and the ground on which he held that was that the provisions of section 158 B (2) of the Bengal Tenancy Act as to the service of notice on the other co-sharers had not been followed. The learned Judge was obviously the Judge to determine whether or not such a notice had been served and that matter is not open to the defendant appellant in this appeal. The only question that has been urged is that the provision as to the giving of the notice of the application for the execution of the decree as mentioned in section 158 B (2) is not mandatory but is merely directory and the failure of the Court to serve such a notice is an irregularity which does not affect the validity of the sale made in execution. I do not agree with that. I think the word "shall" in the section occurring before the words "before proceeding to sell" means that the Court shall not sell unless a notice has been given to the other co-sharers as mentioned in section 158 B (2). I agree with the view adopted by the learned additional District Judge of the lower appellate Court. The present appeal, therefore, fails and must be dismissed with costs.

NEWBOULD J.:—I agree.

A. T. M. *Appeal dismissed.*

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.

SYAMKISOR DE

v.

DINES CHANDRA BHATTACHARYYA AND OTHERS.*

CIVIL.

1919.

August, 19, 25.

Transferee, right of—Legal conveyance not executed—Transferee got in possession—Agreement to sell not denied before suit—Specific performance.

When in pursuance of an agreement to transfer property, the intended transferee has taken possession though the requisite legal documents had not been executed and registered, the position is the same as if the documents had been executed, provided specific performance can be obtained between the parties to the agreement, in the same Court, and at the same time as the subsequent legal question falls to be determined: *Bibi Jamakir* v. *Chatterpat* (1) and other cases referred to.

Appeal by the Defendant.

Suit for recovery of possession of land upon declaration of title by purchase.

The material facts appear from the judgment.

Babus Gopal Chandra Das and *Bibhuti Bhusan Saha* for the Appellant.

Babu Birendra Kumar De for the Respondents.

C. A. V.

The judgment of the Court was delivered by

August, 25.

Mookerjee J.—This is an appeal under order 43 rule 1 (*u*), Civil Procedure Code against an order of remand made under order 41, rule 23, Civil Procedure Code, in a suit for recovery of possession of land upon declaration of title by purchase. The disputed property was mortgaged on the 7th April, 1892 by Ali Chand Bibi, Shaikh Isuf and Shaikh Joman to the father of the plaintiffs to secure a loan of Rs. 130. The mortgagee sued to enforce the security and obtained the usual mortgage decree on the 15th December, 1897 for a sum of Rs. 344 and costs of the litigation. On the 21st March 1903, the decree-holder purchased the property in execution sale for a sum of Rs. 255. On the 9th June, 1906 the auction-purchaser executed a conveyance of the property to one of the mortgagors, Ali Chand Bibi for a consideration of

* Appeal from Order No. 280 of 1917, against the decision of Babu Rajendra Nath Roy, Subordinate Judge of Mymensingh, dated the 25th April, 1917, reversing that of Babu Jyotis Chandra Niyogi, Munsiff of Bajitpore, dated the 25th March, 1916.

(1) (1905) 2 C. L. J. 343.

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Mookerjee, J.

Rs. 800. The conveyance was not registered as required by law, but the original owners, whose possession had not been disturbed by the auction-purchaser, continued in occupation. Meanwhile, Syamkisor De, who held a decree for money against Ali Chand Bibi and Shaikh Isaf, had, in execution, purchased the right title and interest of his judgment-debtors on the 21st December, 1894. For some unexplained reason, he did not take possession for many years and symbolical possession was delivered to him only so recently as 30th December, 1909. The plaintiffs instituted the present suit on the 29th March 1915 for recovery of possession on the strength of their title by purchase at the mortgage sale on the 21st March, 1903. They joined as defendants the representatives in interest of their mortgagors (defendants 1-9) as also Syamkisor De, purchaser of the right, title and interest of their mortgagors (defendant 10). They ignored the conveyance executed by them on the 9th June, 1906. The suit was defended by defendants 1 and 10. The Court of first instance found that the conveyance was genuine and held that although it was inoperative as a conveyance by reason of non-registration, the plaintiffs were equitably estopped from setting up a title inconsistent with the agreement to sell, which could be specifically enforced against them. In this view, he dismissed the suit with costs. On appeal, the Subordinate Judge has held that the conveyance is inoperative in law and that the plaintiffs are entitled to succeed, subject to the exercise of right of redemption by the tenth defendant. In this view, the Subordinate Judge has set aside the decision of the primary Court and remanded the suit. The present appeal has been preferred by the tenth defendant alone.

On behalf of the appellant, it has been argued that the plaintiffs are disentitled to possession, as the agreement to sell was specifically enforceable, and placed them in the same position in a Court of equity as if the requisite legal documents had been duly executed and registered. We are of opinion that this contention must prevail.

It is well-settled, as the result of a long series of decisions in this Court, that when in pursuance of an agreement to transfer property, the intended transferee has taken possession though the requisite legal documents had not been executed and registered, the position is the same as if the documents had been executed, provided specific performance can be obtained between the parties to the agreement, in the same Court, and at the same time as the subsubsequent legal question falls to be determined; *Bibi Jawahir*

Kumari v. *Chatterpat Singh* (1) ; *Sikgheeram* v. *Bhagbat Chander* (2) ; *Bipin Behary* v. *Tincowri* (3) ; *Secretary of State* v. *Forbes* (4) ; *Sarat Chandra* v. *Sham Chand* (5) ; *Puchha Lal* v. *Kunja Behari* (6) ; *Khagendra Nath* v. *Sonatan* (7). These decisions are based on the well-known doctrine of equity enunciated in *Walsh* v. *Lonsdale* (8), that, under certain circumstances, equity regards that as done which should have been done. The result attained in these cases was reached by the Judicial Committee in the case of *Muhammad Musa* v. *Agher Kunwar* (9), by the application of the doctrine of part performance enunciated in *Maddison* v. *Alderson* (10). Illustrations of the application of that principle will be found in *Khagendra* v. *Sonatan* (7), *Jnanchandra* v. *Harimohan* (11), and *Shafikul Huq* v. *Krishna Gobinda* (12). In the case last mentioned, Richardson J. pointed out that the view adopted in this Court, though not in conformity with that taken elsewhere : *Kurri* v. *Kurri* ; (13) ; *Chidambara* v. *Vaidilinga* (14) ; *Ramanathan* v. *Ranganathan* (15) ; *Timan* v. *Benep* (16) is supported by the observation of Lord Moulton in *Lok Yew* v. *Port Rubber Co.* (17) : "The present action, from this point of view, is an action by a bare trustee of land to eject the beneficial owner who is and has for years been in possession of the land and has cultivated it." The transferee under the conveyance was never disturbed in her enjoyment of the property ; the possession which she was allowed to retain lulled her into security or partial security ; she might otherwise have at any time claimed specific performance of the contract of sale, and as the agreement had not been denied by the plaintiffs before the institution of the suit, no question of limitation could be successfully raised in answer to a cross suit if such had been instituted forthwith. In such circumstances, there can be no doubt that the plaintiffs are not entitled to relief in a Court of equity, whether we apply the rule in *Walsh* v. *Lonsdale* (8) or *Maddison* v. *Alderson* (10)

As a last resort, the plaintiffs have urged that the tenth defendant should not be allowed to take up this defence, as the agreement

(1) (1905) 2 C. L. J. 343. (2) (1910) 11 C. L. J. 543.
(3) (1911) 13 C. L. J. 271. (4) (1912) 16 C. L. J. 217.
(5) (1912) 16 C. L. J. 71 ; I. L. R. 39 Calc. 663.
(6) (1913) 19 C. L. J. 213. (7) (1915) 20 C. W. N. 149.
(8) (1882) 21 Ch. D. 9.
(9) (1914) L. R. 42 I. A. 1 ; I. L. R. 42 Calc. 801 ; 21 C. L. J. 231.
(10) (1883) 8 App. Cas. 467. (11) (1917) 22 C. W. N. 522.
(12) (1918) 23 C. W. N. 285. (13) (1904) I. L. R. 29 Mad. 336.
(14) (1913) I. L. R. 38 Mad. 519. (15) (1916) I. L. R. 40 Mad. 1134.
(16) (1915) I. L. R. 39 Bom. 472. (17) (1913) App. Cas. 491 (505).

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to sell was not made with him. We are of opinion that there is no force in this contention. In the first place, the question was raised in the written statement of the first defendant, a representative in interest of the person in whose favour the infructuous conveyance was executed, and at his instance the fourth issue was specifically framed in the following terms :

" Did the plaintiffs sell their interest in the disputed land to Ali Chand Bibi on receipt of consideration ? If so, is the suit tenable ?"

This issue was decided against the plaintiffs by the trial Court. They appealed and got the decision reversed on an erroneous ground. The fact that the tenth defendant alone has appealed does not debar the Court from an enquiry into the grounds of the decision of the Subordinate Judge In the second place, the tenth defendant is not a stranger to the property. He has never lost his right of redemption. If he is called upon by the plaintiffs to redeem their security, he is competent to defeat the claim by proof that their conduct has been such as to disentitle them to assistance from a Court which is enjoined to decide the rights of parties with reference to rules of justice, equity and good conscience.

The result is that this appeal is allowed, the order of the Subordinate Judge set aside and the decree of the Court of first instance restored. This order will carry costs, both here and in the Court of Appeal below.

A. T. M. *Appeal allowed.*

Before Mr Justice Walmsley, and Sir Syed Shamsul Huda, Knight, Judge.

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June, 20.

JARIP SARDAR AND OTHERS

v.

JOGENDRA NATH CHATTERJEE AND OTHERS.*

Estoppel—Suit, maintainability of—Suit to avoid ganti *tenure—Kabuliat executed by settlement-holder in favour of* gantidars—*Settlement, conditions of—Abandonment.*

* Appeal from Appellate Decree No. 721 of 1917, against the decree of A. Mellor Esq , District Judge of Khulna, dated the 29th January, 1917, affirming that of Babu Ganendra Nath Mukherjee, Additional Subordinate Judge of Khulna, dated the 5th May, 1916.

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The *mehal* in respect of which the suit was instituted, was settled for a term of years with A. A created a *ganti* interest in favour of some of the defendants or their predecessors. His interest in the *mehal* was sold for arrears of Government revenue and was purchased by the plaintiff in the present suit. Shortly after the plaintiff's purchase, the settlement officer settled the rent payable for the *mehal* and the settlement was made on the basis of the rent payable by the *gantidar*. The plaintiff shortly after executed a *kabuliat*, in which he agreed to respect the recorded rights possessed by the under-tenure-holders, rights of the village headmen and others in the said estate. The *gantidars* were never in possession and exercised no right as *gantidars* but the plaintiff had not acquired any title by adverse possession:

Held, that the plaintiff was bound to recognise the *ganti* tenure and could not question its existence and hence a suit for a declaration that the defendants had no *ganti* interest in the disputed *mehal* was not maintainable: *Tapanidhi Raghunath* v. *Pitambar* (1) and *Chandramani* v. *Manmatha* (2) followed.

There could be no abandonment by some of the *gantidars*.

Appeal by the Defendants.

Suit for a declaration.

The material facts appear from the judgment of Shamsul Huda, J.

Dr. Sarat Chandra Basak and *Babu Mukunda Behari Mullick* for the Appellants.

Babus Ram Charan Mitter, Sarat Chandra Roy Chowdhury and *Biraj Mohan Majumdar* for the Respondents.

The judgments of the Court were as follows:

June, 20.

Shamsul Huda, J.—The defendants Nos. 3 to 6 are the appellants before us. The plaintiff brought his suit for a declaration that defendants Nos. 1 to 3 have no ganti interest in the disputed mehal, that the entry in the record of rights was incorrect and that such entry so far as it recognises the existence of a ganti right in the names of defendants Nos. 1 to 3 and the predecessors of defendants Nos. 4 to 7, may be ordered to be expunged. He made other prayers in the plaint to which it is unnecessary to refer.

The facts of the case are set forth in the judgment of the Court below and need only be briefly stated. It appears that the mehal in respect of which the suit is instituted was settled for a term of years with one Prannath Dhar. Prannath had created a ganti interest in favour of some of the defendants or their predecessors. His interest in the mehal was sold on the 10th January, 1906, by reason of his default in payment of Government revenue and was purchased by the plaintiff in the present suit.

(1) (1906) 5 C. L. J. 67. (2) (1903) 11 C. L. J. 68.

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It appears that shortly after the plaintiff's purchase on the 23rd June, 1906, the settlement officer settled the rent payable for the mehal and the settlement was made on the basis of the rent payable by the gantidar. The settlement holder, that is, the plaintiff in this suit, executed a kabuliat in the year 1908 and in that kabuliat he agreed to respect the recorded rights possessed by the under-tenure-holders, rights of the village headmen and others in the said estate. It cannot be denied that the rights of the gantidars was a right that was at the time recorded.

The question that arises for our consideration is this: Can the plaintiff, having agreed to respect the right of the gantidar tenants, now ask for a declaration that no ganti right existed. It seems to me that on the authority of the two cases, *Tapanidhi Raghunath Puri* v. *Pitambar Gajendra Mahapaty* (1), and *Chandramoni Mohanti* v. *Manmatha Nath Mittar* (2), he is bound to recognise the ganti tenure and cannot question its existence.

The learned Judge has decreed the plaintiff's suit on the findings that the gantidars were never in possession and exercised no right as gantidars. In my opinion that finding does not dispose of the question. It is not said that the plaintiff has acquired any title by adverse possession. If he cannot question the title of the gantidars by reason of the kabuliat which he executed, it seems to me that he cannot get a declaration that the ganti right does not exist.

It has been argued before us that some of the gantidars, did on certain occasions renounce all claim to the ganti. The answer is that the suit is not based on the ground of abandonment by the gantidars. There could be no abandonment by some of the gantidars only. No issue was raised on this point.

On behalf of the respondents reliance has been placed on the cases of *Gour Chandra Saha* v. *Mani Mohan Sen* (3); *Jahandar Baksh Malik* v. *Ram Lal Hazrah* (4); *Jamna Das* v. *Pandit Ram Autar* (5) and *Jamna Das* v. *Ram Autar Pande* (6). We have examined these cases and in our opinion they do not affect the present question.

It has also been argued before us that the original gantidars have parted with their ganti interest in favour of defendants Nos. 8, 9 and 10 and therefore the original gantidars have no right to prefer

(1) (1906) 5 C. L. J. 67. (2) (1903) 11 C. L. J. 68.
(3) (1905) I. L. R. 32 Calc. 463.
(4) (1910) 11 C. L. J. 364; I. L. R. 37 Calc. 449.
(5) (1911) 15 C. L. J. 68; 16 C. W. N. 97; I. L. R. 34 All. 63 P. C.
(6) (1911) I. L. R. 34 All. 63.

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any appeal to this Court as they have no longer any interest left in the ganti. In my opinion that question cannot be gone into. The defendants explain in their written statements that these sales were merely colourable transactions and the purchasers were mere benamdars. No issue was raised on the question and such controversy cannot, for the first time, be raised in second appeal. I therefore think that the decison of the Courts below decreeing the plaintiff's suit cannot be supported and must be set aside. I would accordingly decree this appeal with costs and dismiss the suit of the plaintiff with costs of all the Courts.

Walmsley, J.—I agree.

A. T. M. *Appeal decreed.*

Before Mr. Justice N. R. Chatterjea and Mr. Justice Newbould.

RADHARAMAN CHOWDHURI AND OTHERS

v.

GOPAL CHANDRA CHAKRAVARTY.*

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August, 25.

Probate—Opposition to grant—Interest—Grandfather's daughter's son's son—Samanodaka—Spiritual benefit—Appeal—Order rejecting opposition to grant of probate—Civil Procedure Code (Act V of 1908), Sec. 115.

A grandfather's daughter's son's son having some sort of relationship with the family, has some interest to appear and oppose the application for probate made by a stranger to the family *viz.* the brother of the sister's husband of the deceased.

Quære : Whether a grandfather's daughter's son's son is excluded from inheritance under the Bengal School even where there is no other heir at all?

Every *samanodaka* cannot be heir. In order that he may inherit, he must also be a *Sakulya i. e.* must belong to the *kula* or family.

The principle of spiritual benefit is the test of heirship under the Dayabhaga school.

No appeal lies against an order of a District Judge holding that the objector had no *locus standi* to oppose the grant of probate. Such an order can be revised by High Court under section 115 of the Code of Civil Procedure.

Appeal and revision by the Objectors.

The material facts appear from the judgment.

* Appeal from original Decree No. 222 of 1917, against the decree of G. N. Roy Esq., District Judge of Burdwan, dated the 17th August, 1917.

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August, 25.

Babus Bepin Behary Ghose and *Mokesh Chandra Banerjee* for the Appellants.

Babu Satindra Nath Mookerjee for the Respondent.

The judgment of the Court was as follows :

This appeal arises out of an application for probate of a will. The respondent Gopal Chandra propounded a will said to have been executed by one Krishna Chandra. The appellants Radha Raman and others who are the grandfather's daughter's son's son of the deceased opposed the application. The learned District Judge held the appellants had no *locus standi* to oppose the grant, and that probate would be granted to the respondent on proof of will in common form. Radha Raman and others have appealed to this Court and an application also has been made under section 115, Code of Civil Procedure against the order of the Court below.

It has been held in several cases that no appeal lies against such an order. The order however can be revised upon the application under section 115, Code of Civil Procedure.

The opposite party being the brother of the sister's husband of the deceased is a perfect stranger to the family, but the Court below held that the petitioners were not heirs and therefore had no *locus standi* to oppose the grant of probate. The question for consideration therefore is whether the petitioners have any *locus standi* to oppose the application.

It is contended on behalf of the petitioners that they are heirs. Under the *Mitakshara* a daughter's son's son in the absence of other heirs succeed as a *bandhu*. See *Krishnayya* v. *Pichamma* (1) ; *Sheobarat* v. *Bhagwati* (2). A grandfather's daughter's son's son stands on the same footing. But the question is whether a daughter's son's son is an heir under the Dayabhaga, because if he is not *a fortiori* the grandfather's daughter's son's son cannot be held to be in the line of heirs.

A daughter's son's son offers no oblation to the maternal grandfather of his own father, and it is accordingly contended on behalf of the opposite party that he is no heir according to the test laid down in the case of *Goorvo Gobind Shaha* v. *Anund Lall Ghose* (3).

That the principle of spiritual benefit governs the law of inheritance in the Dayabhaga was laid down by the Full Bench in the

(1) (1887) I. L. R. 11 Mad. 287.
(2) (1895) I. L. R. 17 All. 525.
(3) (1870) 13 W. R. F. B. 49 ; 5 B. L. R. 15.

above case, and again by another Full Bench in the case of *Digumber* v. *Moti Lal Bundopadkya* (1).

Attempts have been made from time to time to induce the Court to have the matter reconsidered by the Full Court on the ground that spiritual benefit is no test, at any rate not the only test of heirship, and that the Full Bench took an erroneous view of the fundamental principles which underlie the Dayabhaga and consequently arrived at an incorrect conclusion. These attempts have however been unsuccessful, and this Court has held that the matter should not be reopened. See *Kedar Nath* v. *Amritalal* (2); *Kailash Chandra Adhikari* v. *Karuna Nath Chowdhry* (3).

It must now therefore be taken as settled that the principle of spiritual benefit is the test of heirship under the Dayabhaga, whatever view might have been taken of the matter had it been *res integra*. It is to be observed that in all the cases cited above, the question was who was the preferable heir, according to the principle of spiritual benefit. In the present case no question of preference arises as between the petitioners and the opposite party, and therefore there is no question as to the superiority of spiritual benefit to be conferred on the deceased by one as compared to that by the other. The opposite party is a perfect stranger to the family, and in no circumstances can he be in the line of heirs whereas the petitioners are the daughter's son's sons of the grandfather of the deceased. As stated above their position is similar to that of a daughter's son's son, and the question therefore is whether a daughter's son's son is excluded from inheritance under the Bengal School even where there is no other heir at all.

The Dayabhaga (Chapter XI, section 11, verse 2) in discussing the right of the daughter's son to succession says "It is the daughter's son who is the giver of funeral oblation not his son, nor the daughter's daughter for the funeral oblation ceases with him." The daughter's son's son is therefore expressly excluded from inheritance.

On behalf of the petitioners however, reliance is placed upon the arguments advanced by Raj Kumar Sarvadhikari in his Tagore Lectures in favour of the heritable right of a daughter's sons's son. The first is that the mere fact that a daughter's son's son is not a Sapinda heir does not show that he is excluded altogether from inheritance. It is pointed out by him that in the verse cited above Jimutavahana is discussing the preferable right of a Sapinda to

(1) (1883) I. L. R. 9 Calc. 563.
(2) (1912) 16 C. L. J. 342; 17 C. W. N. 462.
(3) (1913) 18 C. W. N. 477.

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succession. The daughter's son is a Sapinda heir but his son is not so; he is not in the line of Sapinda heirs because he is not competent to offer an oblation. A great-grandson's son is not a Sapinda and therefore cannot succeed as a Sapinda, but he succeeds as a Sakulya. The mere fact therefore that a person cannot succeed as a Sapinda does not show that he is excluded altogether.

The next and the main ground which Raj Kumar Sarvadhikari urges in support of his view is that a daughter's son's son is a Samanodaka, and a Sakulya and therefore is entitled to inherit on failure of nearer heirs even on the principle of spiritual benefit.

The reason given by him may be summarised as follows:—The Dayabhaga after dealing with the succession of Sapindas *ex parte paterna* and *ex parte materna*, and that of Sakulya (distant kinsman), in Chapter XI, section 6, verse 23 states "If there be no such distant kindred the Samanodakas or kinsmen allied by a common libation of water must be admitted to inherit as being signified by the term Sakulya (conformably with Budhayana's explanation of it).

After the near Sakulyas therefore the Samanodakas come in, and these samanodakas are also mentioned by Jimutavahana as Sakulyas, they are therefore the remote Sakulyas. Though every person who presents water is properly speaking a samanodaka of the deceased, the law of inheritance has given a limited significance to the term. Every samanodaka cannot be heir because every person is competent to offer libation of water to every other person and in fact in making Tarpan water is offered to every created being. In order that he may inherit the samanodaka must be also a sakulya i. e., must belong to the kula or family.

If the word Kula be understood as meaning only the agnatic family then the daughter's son's son would not belong to the same Kula, but Jimutavahana has not confined the expression to the agnatic family alone. The male descendants of the daughters of the family known as *Bandhus* in the Mitakshara have been included by him in the expression Kula (family) of the deceased.

"Such kinsman having sprung from his family though of different male descent as his own daughter's son or his father's daughter's son or having sprung from a different family as his maternal uncle or the like is heir." It appears therefore that not only those who bear the same gotra or family name, but also those who though they do not bear the family name are sprung from the same line, i.e. cognatic kinsmen known as *bandhus* have been treated as belonging to the same Kula.

Jimutavahan has not stated who these samanodakas are. Srikrishna Tarkalankar has treated them as "remote Sakulyas" "or persons who are sprung from the same family, but whose right of inheritance is postponed to the near Sakulyas who confer a larger amount of benefit on the deceased."

Raghunandan has not mentioned the samanodakas as a class of heirs, but the three classes of bandhus (under the Mitakshara) are stated by him to be entitled to the inheritance. Most of them are heirs being connected by parvana oblations. The rest must therefore come in as samanodakas (as conferring spiritual benefit). He has mentioned the near Sakulyas. The samanodakas therefore must be taken to be the remote Sakulyas.

"As the author of the Dayabhaga has not given us any interpretation of the term samanodaka himself we shall be justified in consulting other writers of the Bengal school who have followed in the footsteps of Jimutavahana for an explanation of the term. We have seen that Srikrishna takes it to mean remote Sakulyas or persons who are sprung from the same family, but whose right of inheritance is postponed to the near Sakulyas who confer a larger amount of benefit on the deceased. Let us now see what Raghunandan says on the subject. "We have the authority of Harlot for saying that the relation of samanodakas ends only where birth and family name are no longer known. Samanodakas are kinsmen who came in after the partakers of the divided oblations. If the details regarding the descent of a given person from a common ancestor are known or if it is known in a general manner that he is simply sprung from the family he is reckoned as a samanodaka."... If our interpretation of the word samanodaka be correct, it would follow that certain male decendants of the daughters of the family are entitled to inheritance. It would follow, I mean that according to the Dayabhaga, the daughter's son's son and similar cognate kinsmen are also heirs" . . . . "Only two conditions then are necessary to entitle a kinsman to be ranked as a samanodaka heir. He must present the water and be 'Allied by the family.' Both these conditions are met with in the daughter's grandson. On what ground then can he be excluded from succession? Even by the principle of spiritual benefit he ought to take his natural place as heir of his father's maternal grandfather."

It was also argued on behalf of the petitioners that we should follow the Mitakshara in matters not expressly dealt with by the Dayabhaga and reliance was placed on a passage in the judgment of Mitra J. (sitting singly) in the case of *Akshay Chandra Bhatta-*

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charya v. *Hari Das Goswami* (1), where he observed that in cases not contemplated by Jimutavahana or his followers the law should be interpreted on rational lines consistently with principles in similar cases, and the decisions of our Courts should not be based on a blind adherance to the principle of spiritual efficacy, as it may lead to the violation of other recognised principles consistent with natural justice, and that in all cases of absence of any express texts or precedents under the Dayabhaga law, Courts should have recourse to the theory of propinquity and natural love and affection as adopted by Vijnaneswara and the commentators of the more ancient and orthodox schools of Hindu Law.

It is also pointed out on behalf of the petitioners that the Dayabhaga lays down that on failure of heirs, the spiritual preceptor or a fellow-pupil succeeds; and in default of them the king gets the property. Under the Bengal Tenancy Act in the case of an occupancy holding it goes to the zemindar who may be a Mahomedan or Christian; and that it is difficult to see how it would be consistent with the doctrine of spiritual benefit that the estate should devolve upon a person belonging to a different religion than upon a daughter's son's son or a grandfather's daughter's son's son.

On the other hand the respondents rely upon the view taken by Banerjee, J. in the case of *Dino Nath Mohunto* v. *Chundi Koch* (1), *viz*, that "the scheme of the Dayabhaga is radically distinct from and to some extent incompatible with the scheme of Mitakshara and the one cannot well be made to supplement the other so far as the law of inheritance is concerned. Nor can it be said that the Dayabhaga is silent upon this point seeing that although the Dayabhaga may be silent so far as express enumeration goes, it is not silent so far as the indication of general principle according to which heirship is to be determined is concerned; that general principle being clearly the principle of spiritual benefit" and which is settled by authority.

Now the question whether the daughter's son's son or the grandfather's daughter's son's son can come in as an heir, on failure of heirs, depends upon whether Raj Kumar Sarvadhikari has taken a correct view as to the meaning of the words Sakulya and Samanodaka upon which he bases the right of the daughter's son's son to succession on the principle of spiritual benefit under the Dayabhaga; or whether the view that the Dayabhaga should be supplemented by the Mitakshara, in cases where there is no heir according to the principle of spiritual benefit, is correct. The question however

(1) (1908) I. L. R. 35 Calc. 721. (2) (1887) 16 C. L. J. 14.

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cannot be finally decided in the present proceedings which arise out of an application for probate, and when the persons who would be entitled to get the property (on intestacy) on failure of heirs viz. the Crown or zamindar (if the property is an occupancy holding) are no parties to the proceedings.

As already stated the opposite party is a perfect stranger to the family, whereas the petitioners claim some sort of relationship (however distant) with the family of the deceased and if the will is disproved the question stated above may have to be decided in a title suit between the petitioners and the person entitled to the estate of the deceased on failure of heirs.

Without deciding any of the said questions, we think that in the particular circumstances the petitioners have some interest in appearing and opposing the application for probate. We accordingly set aside the order of the Court below and direct that the application for probate be heard in the presence of the petitioners as early as possible.

The appeal is dismissed on the ground that no appeal lies, and the above order is made upon the application under section 115 of the Civil Procedure Code. We make no order as to costs. Let the records be sent down without delay.

A. T. R. *Appeal dismissed: Rule made absolute.*

PRIVY COUNCIL.

PRESENT:—*Viscount Haldane, Lord Buckmaster and Lord Dunedin.*

MA HNIT AND OTHERS

v.

MAUNG PO PU.

P. C. 1919. *May, 5. 22.*

[ON APPEAL FROM THE JUDICIAL COMMISSIONER'S COURT, UPPER BURMA.]

Sale—Duties of vendor and purchaser—Transfer of Property Act, (IV of 1882), Sec. 55.

It is the duty of the purchaser to tender a conveyance to the vendor for execution as required by section 55 (1) (d) of the Transfer of Property Act, and until such tender is made or waived the purchaser has no right to obtain the title-deeds.

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Appeal from a judgment and decree of the Additional Judge of the Judicial Commissioner's Court, Upper Burma, dated the 8th March, 1917, reversing a judgment and decree of the District Judge of Magwe, dated the 23rd September, 1913.

The material facts are stated in their Lordships' judgment.

Sir William Garth, K.C. for the Appellants: Section 55 of the Transfer of Property Act, imposes a duty on the purchaser to tender a conveyance to the vendor for execution. Until that is done the purchaser has no right to obtain the title-deeds. There is no evidence here that such a tender was made by the purchaser or that the vendor waived such performance. At any rate the purchaser cannot claim the title-deeds until he has paid the price, and the vendor would be justified in refusing to hand over the deeds until payment. The giving of promissory note cannot by itself amount to payment.

Sir Erle Richards, (*J. M. Parikh* with him) for the Respondent: The promissory note is security for payment. On a true construction of the contract the appellant should have transferred the well. As he did not do so there was a continuous breach. Thus there was no consideration for the promissory note. There are concurrent findings of fact that the title deeds were refused.

Parikh followed.

Garth was not heard in reply.

The judgment of their Lordships was delivered by

May, 22.

Viscount Haldane:—On the 20th October, 1909, U-Lu-Gale, the father of the appellants, who sue as his legal representatives, entered into a written agreement to sell an oil well in Upper Burma to the respondent for Rs. 45,000, of which 10,000 were to be paid when the agreement was executed, and the balance of 35,000 within 45 days. The purchaser was to execute a deed of sale, and the vendor was also to execute and to register the deed. On the 4th December following the purchaser gave a promissory note for 35,000, the balance of rupees, with interest at one rupee per cent. per month, till payment, and the vendor signed a receipt acknowledging receipt of the price in full. The purchaser later on, on the 10th November, 1910, signed another promissory note in favour of the appellants, the vendor having died just before, by which he promised to pay them Rs. 1,050, with interest also at the rate of one rupee per cent. per month. This sum represented interest unpaid under the first promissory note. The respondent afterwards paid interest for five months to the appellants, and since then he has paid nothing.

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The action out of which this appeal arises was brought by the appellants against the respondent to recover the sums due under the two promissory notes with interest, the total amount claimed being Rs. 42,899/8. The question which now arises is whether the respondent can decline to pay this, on the ground that he has been prevented from obtaining possession of the title deeds to the well, because U-Lu-Gale refused to hand them over until the money due under the first note was paid. From the evidence and the findings of fact in the Courts below it appears that the purchaser did, while the money so due remained unpaid, try to get the title deeds from the vendor, in order that he might effect a re-sale. The vendor objected to hand them over, the purchase not having been completed. It does not appear that the purchaser at any time tendered a conveyance, which is the preliminary to registration.

The Judge of the District Court, who tried the case, held that the vendor was within his rights in thus refusing to hand over the title deeds, and gave judgment for the appellants. This judgment was reversed by the Judge who heard the appeal to the Court of the Judicial Commissioner of Upper Burma. He took the view that the promissory note of the 4th December, 1909, followed by the receipt already referred to, effected a novation, and put the purchaser in the same position as if he had actually paid the full price. He was therefore entitled to claim the title deeds. He accordingly held that the contract had been broken by the vendor, and that it was at an end, with the result that there had been failure of the consideration for which the promissory notes were given, and that they could not be enforced.

With this conclusion their Lordships find themselves unable to agree. There was no defence to the action for the amount due under the notes, unless the purchaser could establish a counter-claim to set aside the main contract on the ground that the vendor had broken it by refusing to hand over the deeds. But the duty of the purchaser, having regard to the analogy of what is laid down by section 55 of the Indian Transfer of Property Act, 1882, which is treated as defining what ought to be the practice in Upper Burma, was to tender a conveyance, and he would then, and not before such a tender was either made or waived, have the right to the deeds as the accompaniment of the transferred title. There is no evidence that the purchaser in this case ever tendered any conveyance or asked for a change in the register. Probably all he thought of was how, at a time when oil wells were fetching a higher price than they did later on, to get deeds which would show a possible purchaser

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from himself that he had an actual title to a well. Whether the Judge of appeal was right in treating the receipt given on the 4th December, 1909, with the first promissory note in exchange for which it was signed, as having effected a novation, is a question which may require consideration. But even if it were answered affirmatively, it is far from clear that the purchaser could have counter claimed against the vendor for recision, without being ready to pay the amount due under the note. It is, however, enough for the decision of this appeal to say that their Lordships agree with the Judge of first instance that there was no right to obtain the deeds without first tendering a conveyance.

Their Lordships do not attach importance to the suggestion that the appellants are not strictly shown to be the legal representatives of the vendor. Any difficulty in this respect could obviously be cured by amendment, and the learned counsel for the respondent have wisely abstained from pressing a point which could only add to the cost of this litigation.

The only other observation which their Lordships desire to make is that there appears to have been much delay in disposing of the appeal to the Court of the Judicial Commissioner. The judgment of the District Judge was given on the 23rd September, 1913. The case was not heard in the Court of appeal until the 8th March, 1917, although the appeal to that Court was presented on the 24th November, 1913. The diary of the Court of the Judicial Commissioner discloses a series of postponements, some of which were due to the apparent inability of the Court to sit for the hearing of the case. Their Lordships think that so great a delay in disposing of the appeal should have been avoided if possible.

They will humbly advise His Majesty that the judgment of the Court of the Judicial Commissioner should be reversed, and that of the District Judge restored. The respondent will pay the costs of this appeal, and of the appeal to the Court of the Judicial Commissioners.

Edward Dalgado—Solicitor for the Appellants.

T. L. Wilson & Co.—Solicitors for the Respondent.

J. K. R. *Appeal allowed.*

PRESENT:—*Viscount Cave, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.*

SRI SRI SRI VIKRAMA DEO MAHARAJULUM GARU, MAHARAJAH OF JEYPORE AND ANOTHER

v.

SRI SRI SRI VIKRAMA DEO GARU.

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May, 12.

[CONSOLIDATED APPEALS FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Impartible zamindari—Maintenance—Custom—Burden of proof.

Apart from custom and from certain near relationships to the holder of an impartible zamindari the junior members of the family of the zamindar have no right to maintenance out of it, and there is no invariable custom by which any member of the family beyond the first generation from the last holder can claim maintenance as of right.

The burden of proving the custom is on the person who alleges it.

Raja Rama Rao v. *Raja of Pittapur* (1) followed.

Appeal and cross-appeal from a judgment and decree of the High Court of Madras dated the 22nd December, 1914, which varied a judgment and decree of the Agent of the Governor of Vizagapatam, dated the 22nd December, 1909.

The material facts are sufficiently stated in their Lordships' judgment.

De Gruyther, K. C. (and *Kenworthy Brown*) for the Appellants:

There is a custom in the family according to which the members are not entitled as of right to maintenance. At any rate the suit was barred by limitation. The burden of proving a custom entitling the plaintiff to maintenance lies on the plaintiff. The Courts below have wrongly laid on the defendants the burden of proving a custom disentitling the plaintiff to maintenance: *Raja Rama Rao* v. *Raja of Pittapur* (1) referred to.

Dunne, K. C. (*B. Dube* with him) for the Respondent: According to the custom of the family and the general principles of Hindu Law the plaintiff is entitled as of right to maintenance. There are concurrent findings as to the existence of such a custom in the defendant's family. The plaintiff's claim was not barred by limitation at the date of the suit.

No reply called for.

The judgment of their Lordships was delivered by

(1) (1918) L. R. 45 I. A. 148; 28 C. L. J. 428.

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Maharajah of Jeypore v. Vikrama Deo Garu.

May, 12.

Viscount Cave :—This is an appeal from a decree of the High Court of Madras, which affirmed, with a variation, the decree of the Agent to the Governor at Vizagapatam, dated the 22nd December, 1909.

The suit was brought by the plaintiff, who is the cousin of the first defendant the Maharajah of Jeypore, for maintenance out of the impartible estate held by the defendant. In consequence of previous decisions of the Courts, the case took a course which makes it impossible finally to determine the matter to-day.

The plaintiff in the action rested his case upon the contention that, according to the general Hindu law, he, as the son of a brother of the late Maharajah, was entitled to maintenance out of the estate. The defendants in their statements, proceeded more or less upon the same basis, but alleged a special custom which deprived the plaintiff of that which was treated as being his *prima facie* right.

Upon that, issues were framed, the important issues being the third and fourth. The third issue was :—Whether, if the plaintiff reverted to his natural family, by reason of his adoption into another family being invalid, the first defendant is bound to maintain him according to Hindu law out of the income of the Jeypore zamindari. The fourth issue was :—"Whether according to the custom among Uriya zamindars or the custom of the family, the first defendant is not liable to maintain the plaintiff out of the income of the Jeypore zamindari."

Both Courts acting, as they considered, upon the existing authorities, answered the first issue in the affirmative and, upon the evidence, answered the second issue in the negative : and, accordingly, maintenance was decreed to the plaintiff.

Since those decisions were given this Board, in the case of *Raja Rama Rao* v. *Raja of Pittapur* (1) has decided that, apart from custom and from certain near relationships to the holder the junior members of the family of a zamindar entitled to an impartible zamindari have no right to maintenance out of it, and that there is no invariable custom by which any member of the family beyond the first generation from the last holder can claim maintenance as of right.

In view of that decision, it is plain that the issue which should have been tried was not that which in fact was tried but "Whether according to the custom among Uriya zamindars, or the custom of the family, the plaintiff is entitled to maintenance

(1) (1918) L. R. 45 I. A. 141 ; 28 C. L. J. 428.

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out of the income of the zamindari"; in other words, the burden should have been put upon the plaintiff to prove the custom entitling him to maintenance, and not upon the defendants to prove a custom negativing the ordinary law.

That being so, it appears to their Lordships that, in order to do justice, the case must be sent back, in order that the issue which their Lordships have defined should be tried, and accordingly the case should be remitted to the High Court in order that they may direct that issue to be tried, and may dispose of the case in accordance with the finding.

Their Lordships have considered whether the question of amount should also be remitted; but, upon the whole, they have come to the conclusion that if as the result of the issue now directed, the plaintiff is found entitled to maintenance, the amount fixed by the High Court should not be disturbed.

Their Lordships will, accordingly, humbly advise His Majesty to remit the matter for the purpose mentioned.

The costs incurred in the Courts below will follow the ultimate event of the proceedings. There will be no costs of this appeal.

As regards the cross-appeal which was withdrawn on an undertaking to pay the costs, that undertaking will of course remain unaffected by the present order as to costs.

T. L. Wilson & Co.—Solicitors for the Appellant.

Douglas Grant—Solicitor for the Respondent.

J. K. R. *Case remitted.*

APPELLATE CIVIL.

Before Mr. Justice N. R. Chatterjea and Mr. Justice Duval.

MADHUSUDAN KOER
v.
BADRIDAS AND ANOTHER.*

CIVIL.
1919.
June 6, 11.

Damages—Assessment of—Contract, breach of.

The plaintiff was a dealer in flour and other goods at Rungpur and used to get his goods from the defendants' firm at Allahabad. The plaintiff wrote a letter on

* Appeal from Appellate Decree No. 937 of 1917, against the decree of S. C. Mullick Esq., District Judge of Rungpur, dated the 10th April, 1917, affirming that of Babu Debendra Nath Banerjee, Subordinate Judge of Rungpur, dated the 29th February, 1916.

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the 21st July 1914 to the defendants to the following effect; "Within 5 or 7 days in July I shall send an order for one wagon of goods. Please write *Sweda* (contract) in respect thereof." It was further stated that the plaintiff would send for 2 wagons for delivery in August, 2 wagons in September, 2 wagons in October and 2 in November and that these wagons would be sent for (one at a time) at an interval of 15 days. The plaintiff asked the defendants to quote rates. On the 24th July the defendants sent a reply quoting the rates from July to November. On the 24th July the plaintiff sent a telegram ordering delivery of one wagon of goods on a former contract and that was despatched by the defendants. On the 26th July 1914, the plaintiff wrote as follows: "The goods ordered for might have been sent by you. Please write *sweda* for one wagon for the month of July in respect of flour etc." Then followed the rates of the goods as quoted in the defendants' letter dated the 24th July. The letter then proceeded as follows: "Please write *sweda* for 4 wagons in respect thereof. On arrival of the goods ordered, I shall send for 1 wagon of July *sweda*. Further I shall make the *sweda* for the months of October and November *pucca* hereafter. Please send a reply to this letter." On the 29th July, a letter dated the 28th July was despatched by the defendants to the plaintiff in which the same rates as were quoted on the 24th July were given. On the 29th July the defendants sent a telegram to the plaintiff in which they gave different rates from what were quoted in their letter dated 24th July. On the 30th July the plaintiff objected to the rates mentioned in the telegram:

Held, that the letter dated the 24th July constituted complete contract.

That the rate of damages was the difference between the price prevailing at Rungpur on the day of delivery and the contract rate plus the cost of freight and bags.

Appeal by the Plaintiff.

Suit for damages for breach of a contract.

The material facts appear from the judgment.

Babus Sarat Chunder Roy Chowdhury and *Rishindra Nath Sarkar* for the Appellant.

Babus Baidya Nath Dutt and *Bhupendra Kumar Ghose* for the Respondents.

June. 11.

The judgment of the Court was as follows:

This appeal arises out of a suit for damages for breach of a contract.

The plaintiff who is a dealer in flour and other goods at Rungpur used to get his goods from the defendants' firm at Allahabad.

The questions which arise in this case are first whether there was a complete contract between the parties; and secondly, if so what is the principle on which the plaintiff should be entitled to damages.

The Courts below are of opinion that there was no complete contract.

Now, the question whether there was such a contract or not, is to be decided upon a construction of certain letters which passed between the parties.

The first letter is dated the 21st July 1914 written by the plaintiff to the defendant. In this letter the plaintiff stated as follows:—"Within 5 or 7 days in July I shall send an order for one wagon of goods. Please write *swoda* in respect thereof." It was further stated that the plaintiff would send for 2 wagons for delivery in August, 2 wagons in September, 2 wagons in October and 2 in November and that these wagons would be sent for (one at a time) at an interval of 15 days. The plaintiff asked the defendants to quote rates. On the 24th July, the defendants sent a reply in which they gave the present rates i. e., for July and they stated that in August and September the rate would be increased by 2 annas in the maund and in October and November the increase would be at the rate of 4 annas per maund over the July rate.

It appears that on the 24th July the plaintiff had sent a telegram ordering deli very of one wagon of goods on a former contract and that was despatched by the defendants. On the 26th July 1914, the plaintiff wrote as follows:—"The goods ordered for might have been sent by you; please write *swoda* for one wagon for the month of July in respect of flour &c." Then followed the rates of the goods as quoted in the defendant's letter dated the 24th July. Then the letter then proceeds as follows:—"Please write *swoda* for 4 wagons in respect thereof. On arrival of the goods ordered, I shall send for 1 wagon of July *swoda*. Further I shall make the *swoda* for the months of October and November pucca hereafter. Please send a reply to this letter." This is the document upon which the suit is based, as completing the contract for delivery of one more wagon in July and two wagons in August and September.

The translation given of the letters which were in Hindi or Mahajani character is taken from the translation supplied to us on behalf of the appellant and which is different from the translation made by the Court Translator of the Appellate Side. The translation made by a senior Translator on the Original Side of this Court agrees with the translation made by the appellant. We have also been supplied with copies of the original letters in the Bengali character.

The main point to be considered in connection with the construction of the letters is whether the words সওদা লিখবেন জী (*sowda likhbengi*) refer to the writer of the letter or to the addressee, i.e. do they mean "I will write sowda" or "you will please write sowda."

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The Courts below have apparently taken the view that they mean the former showing that the contract was not yet complete. But it appears from exhibit 2 that in the last line of the letter, namely চিঠিকা অবার লিখেছে জী the words "likhe nge ji" cannot possibly refer to the writer of the letter; it must have reference to the person addressed namely the defendant: and if that is so, the same meaning should be attached to the words appearing in the earlier part of the document viz. "পাড়ি and সওদা লিখেছে জী" We think that the words সওদা লিখেছে জী must mean that the defendant was to enter up the *Sowda* (contract).

Then the learned District Judge lays much stress on the fact that the words used in the document are used in the future tense and that is also relied upon by the learned pleader for the respondent. But the future tense used is in connection with the contract for October and November for which, it is expressly stated in the letter, contract would be made hereafter: and that is distinguished from the *sowda* (contract) for July and August with respect to which the plaintiff wrote to the defendant to "write *Sowda* or contract." That this is the correct construction of the document, also appears from the fact that the plaintiff made a remittance of Rs. 850 to the defendant firm at Allahabad on the 1st. August and also sent Rs. 1,000 on the 5th August and orders were sent along with the remittance giving details of the goods to be supplied under the terms of the contract.

It appears that on the 29th July the defendants sent a telegram to the plaintiff in which they gave different rates from what were quoted in their letter dated 24th July. On the next day, 30th July, the plaintiff wrote a letter to the defendants expressing surprise at the different rates given in their telegram. It was further stated in that letter that the plaintiff had accepted the proposal of the defendants and sent orders for 6 wagons of goods of which the defendants had despatched only one. The letter went on to say, "The rest *i. e.* 1 for July and 4 for August and September still remains undespatched. After entering into contract with you, I have sold the goods here to my customers in advance at the old rate mentioned in your letter. So you see I will be put to a very false position and incur severe loss if I be driven to accept the rate mentioned in your telegram. I hope you will be pleased to rectify your mistake and despatch the goods at the former rate mentioed in your letter of 1st Sravan sudi Sambat 1971.

Now, before the telegram of the 29th July was sent from Allahabad, a letter dated 28th July had been despatched on the 29th by

the defendant to the plaintiff in which the same rates as were quoted on the 24th July, were given: and up to that time there was no repudiation of the original contract. It was only in the telegram so despatched that the defendants appear to have resiled from the original contract.

The defendants did not return the money until after the institution of the suit which was instituted on the 14th September, 1914. Even if there was no complete contract contained in exhibit 2, it seems to us that after the defendant had sent in his quotation and the plaintiff made the remittance and gave the order, there was acceptance of the offer which constitued a complete contract.

The plaintiff asked the Court to call upon the defendants to produce the letters; and the Court made an order to that effect. But the defendants did not produce the letters. It does not appear whether the defendants were actually served with notice to produce them. However that may be, the fact remains that in accordance with what was written in exhibit 2, the plaintiff made the remittance and gave orders for the goods to be supplied.

We are accordingly of opinion that there was a complete contract upon these documents.

The next question is as to the damages.

The plaintiff has stated his claim for damages in two schedules attached to the plaint. In the first, he gave the difference between the market rate at Allahabad and the contract rate at Allahabad and in the second schedule he gave the market rate at Allahabad and the market rate at Rungpore and claimed the balance after allowing for costs of freight and bags. The learned Subordinate Judge was of opinion that the principle on which the damages were claimed was erroneous because in his opinion the damage in the second schedule was too remote and should not be allowed. The learned District Judge was also of opinion that the plaintiff in claiming damages at the rate prevailing at Allahabad had claimed on an erroneous principle. He apparently overlooked the fact that in the second schedule the plaintiff had also claimed the difference between the contract rate and the prevailing rate on the day of delivery at Rungpore.

Our attention has been drawn to a passage in the judgment of the learned Judge where he says "There is no reliable evidence to show at what rates the goods were available at Rungpur the place of delivery." Before taking up the question of damages, the learned Judge in another portion of his judgment says "In view of the finding recorded above, it is hardly necessary to decide whether the

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plaintiff suffered any loss on account of his not having received the goods from the defendants."

It is clear therefore that he did not properly apply his mind to the question of damages and in the next place it appears from his judgment that he entirely overlooked the fact that the plaintiff had claimed damages at the Rungpore rate. We do not think that he meant to arrive at any definite finding on the evidence on the record which we understand is entirely one-sided.

We think that the rate of damages should be the difference between the price prevailing at Rungpur on the day of delivery and the contract rate plus the cost of freight and bags.

In these circumstances we think that the case should go back to the lower appellate Court in order that the question of damages may be gone into and the appeal disposed of according to law.

Costs will abide the result.

A. T. M. *Case remanded.*

FULL BENCH.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir John Woodroffe, Knight, Judge, Sir Asutosh Mookerjee, Knight, Judge, Mr. Justice N. R. Chatterjee and Mr. Justice Newbould.

CIVIL.
1919.
July. 30, 31. August, 7.

UTTAM CHANDRA DAW

v.

RAJKRISHNA DALAL AND ANOTHER*

Redemption, suit for—Transfer of Property Act (IV of 1882), Sec. 99, sale in contravention of, effect of—Irregular sale—sale, what passed at—Procedure for setting aside sale—Suit to enforce a trust—Limitation Act (IX of 1908). Sec. 10, Sch. I Arts. 120, 148—Evidence Act (I of 1872), Sec. 114 Illus. (e)—Presumption—Lease to bid—Mortgagee purchaser, if a trustee—Mortgage by conditional sale—Lease of mortgaged property to mortgagor by mortgagee—Relation of parties—Rent, suit for—Suit not for recovery of arrears of interest on mortgage—Civil Procedure Code (Act V of 1908) O. 34 R. 14—

* Full Bench Reference in Appeal from Appellate Decree No. 2396 of 1916, against the decree of H. P. Duval Esq., District Judge of 24-Pergunas, dated the 14th June, 1916, modifying that of Babu Profulla Krishna Ghose, Munsiff, 2nd Court, at Basirhat, dated the 19th January, 1915.

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1919.
UTTAM
v.
RAJKRISHNA.

Right to redeem, if a personal right—Equity of redemption, sale of—Mortgagor, if can exercise right of redemption.

Per Curiam: Where a mortgagee has, in contravention of section 99 of the Transfer of Property Act, attached the mortgaged property and brought it to sale and purchased it himself, the mortgagor or his transferee cannot successfully maintain a suit for redemption of the property, without first getting the sale set aside:

Panchan v. *Kishan* (1) over-ruled.

A sale in contravention of section 99 of the Transfer of Property Act, is not a nullity: *Ashutosh* v. *Behari Lal* (2) followed.

Per Mookerjee J.: Such a sale is an irregular sale liable to be avoided, merely on proof that the terms of the section had been contravened. It operated to transfer the equity of redemption from the mortgagor to the mortgagee. It could be set aside at the instance of the judgment-debtor on an application under section 244 of the Code of Civil Procedure of 1882. If such application was not made either before or after confirmation, the sale became final and conclusive, and under section 316 of the said Code of Civil Procedure, the title to the property sold (that is, the equity of redemption) vested in the purchaser from the date of confirmation, so far as regards the parties to that suit and persons claiming through or under them.

An irregular sale must be formally vacated and cannot be ignored as a nullity.

Per Curiam: Assuming that by reason of sale, the mortgagee became trustee of the equity of redemption for the mortgagor, a suit for redemption would not lie.

Per Sanderson C. J.: If the suit be treated as a suit to enforce a trust, article 120 and not article 148, schedule I of the Limitation Act would apply.

Per Woodroffe J.: Neither article 148 nor section 10 of the Limitation Act would apply to such a suit, if maintainable. Article 148 refers to a suit for redemption and not to a suit where equity of redemption has passed out of the mortgagor who seeks to enforce a trust in his favour upon the taking of an account which is not that of an ordinary mortgage suit.

Per N. R. Chatterjea J.: Section 10 of the Limitation Act would not apply to such a suit.

Per Sanderson C. J.: The presumption under section 114 Illus. (e) of the Evidence Act, that a decree-holder purchaser obtained permission to bid is not to be drawn in the absence of any evidence and in view of the terms of section 99 of the Transfer of Property Act.

Per Mookerjee and N. R. Chatterjea JJ.: The effect of a *kabuliat* executed by a mortgagor to a mortgagee, after its execution, was that of landlord and tenant and not that of mortgagee and mortgagor. The mere fact that the lands were let out to the mortgagor, would not alter the relation between the parties.

(1) (1910) 12 C. L. J. 574.
(2) (1907) I. L. R. 35 Calc. 61; 6 C. L. J. 320.

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1919.

Uttam v. Kaikrishna.

A suit for recovery of rent, although the sum to be recovered is to be applied in satisfaction of the interest due on the mortgage, is not a suit for recovery of arrears of interest on the mortgage.

Per Mookerjee J.: The right to redeem is not a personal right; it is an interest in the property mortgaged, so that when the equity of redemption has been sold away, the mortgagor can no longer exercise his right of redemption.

At the time when the Transfer of Property Act was passed, the rule has been recognised by Courts that where a mortgagee had obtained a money decree for the mortgage debt and had, without the leave of the Court, taken the equity of redemption in execution, he has, on equitable grounds, liable to be treated, notwithstanding his purchase, as a mortgagee holding the property in trust for the mortgagor. The legislature recognised the prevailing rule of equity in section 99 of the Transfer of Property Act, but modified its application in two directions. In the first place, the mortgagee was prohibited to purchase the equity of redemption in execution of his own decree, whether it was a money decree for the mortgage debt or for a claim related thereto or whether it was a decree for a claim entirely unconnected therewith. In the second place, the prohibition was absolute, and the legislature did not contemplate a purchase by the mortgagee even with the leave of the Court.

Section 99 of the Transfer of Property Act has now been replaced by a less comprehensive rule (O. 34 r. 14 of the Code of Civil Procedure). The disability of the mortgagee is restricted to cases where he purchases the equity of redemption at a sale held in execution of a decree for the payment of money in satisfaction of a claim arising under the mortgage. The mortgagee, if he has a claim against the mortgagor independent of the mortgage, has the same right that other creditors have to realise it by the attachment and sale of the equity of redemption. In such a case, the decree-holder must obtain leave to bid under O. 21 r. 72 of the Code of Civil Procedure, and, when he has obtained leave, he is in the position of an independent purchaser: *Mahabir* v. *Macnaghten* (1) and *Ganga Pershad* v. *Jowahir* (2) referred to. This differentiates the case of an execution sale from a private sale of the equity of redemption.

Appeal by the Defendant.

Suit for redemption.

The mortgagors on the 6th April, 1891, mortgaged the property in dispute by way of conditional sale, under which the mortgagee was to hold possession and enjoy the usufruct of the property mortgaged by way of interest. On the same date the mortgagors executed a *kabuliat* in favour of the mortgagee under which they were to hold the land mortgaged as tenants under the latter on payment of half the produce or Rs. 50 as the value thereof, for the period of the mortgage, that is, till the 12th April, 1898. It was also provided that on non-payment of half the produce, (or the price

(1) (1889) I. L. R. 16 Calc. 682; L. R. 16 I. A. 107.
(2) (1891) I. L. R. 19 Calc. 4.

thereof Rs. 50) they would be liable to be ejected. The morgagors defaulted to pay the share of the crops, and the mortgagee thereupon brought a suit for rent and also for ejectment. He obtained a decree for rent and the decree contained a direction that the defendants should be ejected if the decretal amount was not paid within 15 days. The payment was not made and the decree was executed, and the defendants were ejected on the 4th July 1892. The mortgagee subsequently took out execution of the decree for rent and purchased the equity of redemption on the 5th December, 1892. The sale was confirmed on the 6th January, 1893, the sale certificate was granted to the purchaser on the 18th April, 1893 and possession was taken in 1895. On or about the 24th April, 1902, one of the mortgagors who had by inheritance taken the shares of the other two, professed to sell the equity of redemption to K for a sum of Rs. 81. On the 10th May, 1913, the sons of K, who had died meanwhile, conveyed the equity of redemption to the plaintiffs for a sum of Rs. 350, the purchasers retained out of the consideration money Rs. 170 and undertook to pay the dues of the mortgagee. On the 20th November, 1913, the plaintiffs, on the strength of their purchase of the equity of redemption, instituted the present suit against the mortgagee for redemption and recovery of possession. The Courts below decreed the suit, holding concurrently that notwithstanding his purchase of the equity of redemption, the mortgagee was liable to be redeemed by the mortgagors or their representatives in interest. The mortgagee defendant preferred a second appeal. The appeal was heard in the first instance by Chitty and Walmsley JJ. who held that the decision in *Panchan Lal* v. *Kishun Pershad* (1) was inconsistent with that of the Full Bench in *Ashutosh* v. *Bihari Lal* (2) and consequently expressed a doubt as to its correctness. They accordingly referred the matter to a Full Bench by an order of reference, which has been published in p. 318 of 28 C. L. J.

The matter was heard by a Full Bench (Sanderson, C. J., Woodroffe, Chitty, Fletcher and N. R. Chatterjea, JJ.) on the 20th November, 1918, when the Court gave the following direction:

"We direct that the record in execution case No. 1128 of 1892 in the Court of the Munsiff of Basirhat be sent up to this Court with every despatch with a finding by the lower appellate Court as to whether the appellant obtained the permission of the Court to bid at the sale of the equity of redemption on the 5th December,

(1) (1910) 12 C. L. J. 574.
(2) (1907) I. L. R. 35 Calc. 61; 6 C. L. J. 326.

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1892 or whether the mortgagor consented to the sale thereof to the appellant."

The District Judge reported that the record of the execution case was destroyed in accordance with the rules many years ago, but he held on the principle deducible from illustration (e) to section 114 of the Indian Evidence Act, namely, that the Court may presume that judicial and official acts have been regularly performed, the inference might legitimately be drawn that the mortgagee obtained the permission of the Court to bid at the sale of the equity of redemption on the 5th December, 1892. The case was then placed before the present Full Bench for final disposal.

Babu Manmatha Nath Ray (with him *Babu Surya Kumar Aich*) for the Appellant: Submitted that *Pancham Lal's case* (1) is in conflict with the decision of the Privy Council in *Khiaraj Mal* v. *Daim* (2). The former has not been rightly decided. The question of limitation was raised in a two-fold way in the Privy Council case (2). The words beginning with "now be avoided" in the 2nd paragraph at p. 312 of I. L. R. 32 Calcutta i.e. *Khiaraj Mal's case* (2) are to be read with the words beginning with "In any case the point taken etc." in the last three lines in the 2nd paragraph at p. 316. Their Lordships in the Privy Council decided the question irrespective of the fact whether the claim arose under the mortgage or not and their Lordships held that the sales could not be impeached after the expiry of the time allowed by law on the ground of mere irregularities. Redemption was allowed only in those cases in which the mortgagors were not represented in the execution proceedings. The decision in *Pancham Lal's case* (1) is in conflict with the full Bench case of *Ashutosh Sikdar* v. *Behari Lal* (3). The decision in *Pancham Lal's Case* (1) cannot be supported if the Full Bench case (3) is read along with the Privy Council case (2). No question of limitation arose in the Full Bench case (3).

Referred to the judgment of Mookerjee J. in the Full Bench case (3) and also to Dr. Ghose's Mortgage, 4th Ed. p. 988.

The dictum in *Pancham Lal's case* (1) is too wide. The mortgagee does not become a trustee.

Distinguishes *Kamini* v. *Ram Lochan* (4), where the decree and the sale were impeached as fraudulent and oppressive. The sale was there held on the 25th June 1866 and injunction was granted

(1) (1910) 12 C. L. J. 574; 14 C. W. N. 579.
(2) (1904) L. R. 32 I. A. 23; I. L. R. 32 Calc. 296.
(3) (1907) I. L. R. 35 Calc 61; 6 C. L. J. 320. F. B.
(4) (1870) 5 B. L. R. 450.

ted by Mr. Justice Norman on the 25th September 1867. It is not clear from the report if the suit was within time. This case was considered in the Privy Council case of *Makabir* v. *Macnaghten* (1). It was held that the principle applied when there was no leave to bid. It was held in the Privy Council case that the mortgagee bought not merely the equity of redemption but also the mortgaged property.

Distinguished *Martand* v. *Dhondo* (2) Submitted that there the mortgagee availed himself of his position to obtain an undue advantage. There the question was between the mortgagor and a purchaser of the properties. Referred to *Maya n Pathuti* v. *Paluran* (3) which followed *Martand* v. *Dhondo* (2). Referred to *Erusappa* v. *Commercial Bank* (4).

It is not quite accurate to say that a mortgagee is a trustee for the mortgagor : See Dr. Ghose's Mortgage, 4th Ed. p. 199.

Referred to Dr. Ghose's Mortgage 4th Ed. p. 314.: *Sakadu* v. *Devlya* (5) ; *Dharani* v. *Budharan* (6) ; *Lal Bahadur* v. *Abharan Singh* (7) and *Sheo Narain* v. *Ram Jatan* (8).

As to the question whether there was leave to bid, relied upon the presumption under the Indian Evidence Act, Sec. 114 (e) that judicial acts have been regularly performed. The sale was held under the Civil Procedure Code—the sale certificate does not use the expression "বাকীপড়া" but says" দেনাদেয় যে ক্রয় লভ্য ছিল" and the decree-holder could not bid without the permission of the Court.

The sale was confirmed. No application was filed all this time to set aside the sale, neither party suggested that there was no leave to bid. The decree in execution of which the sale took place was in respect of claims not arising under the mortgage.

Babu Sarat Chandra Ray Chowdhury (with him *Babu Satya Charan Sinha*) for the Respondents :—

The underlying principle of the decision in *Panchum Lal's* case (9) is sound and although some observations in it may be too wide, that principle has been followed in many cases. The principle is that a sale held in contravention of the provisions of section 99 of the Transfer of Property Act is not a nullity but the mortgagee purchasing at such a sale does not acquire an irredeemable title. This is a necessary incident of the mortgage transaction.

(1) (1889) L. R. 16 I. A. 107 ; I. L. R. 16 Calc. 682.
(2) (1897) I. L. R. 22 Bom. 624.
(3) (1899) I. L. R. 22 Mad. 347.
(4) (1899) I. L. R. 23 Mad. 377.
(5) (1911) 14 Bom. L. R. 254.
(6) (1907) I. L. R. 30 Mad. 362.
(7) (1915) I. L. R. 37 All. 165 F. B.
(8) (1917) 2 P. L. J. 587.
(9) (1910) 12 C. L. J. 574 ; 14 C. W. N. 579.

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The mortgagee by his contract acquires certain known and defined rights and comes under certain well-known obligations and especially the obligation of restoring the property on the payment of the debt. He cannot by any voluntary act of his own divest himself of his character as mortgagee and the obligations incident to it. Of course he may enforce his rights as mortgagee by bringing a suit for foreclosure or sale. But in such a suit an account is to be taken and the other usual safeguards protecting the rights of the mortgagor are provided Now, if a mortgagee be allowed to bring to sale and purchase the mortgaged property in execution of a money decree for a claim arising out of the mortgage, the result would be that the mortgagee indirectly does that which he cannot do directly, *viz.*, that he shakes off his obligation as mortgagee and takes the property without going through a mortgage suit with the safeguards provided by it over mortgagor's interest.

Hence before the Transfer of Property Act was enacted a mortgagee was not allowed as a rule to obtain a sale of the equity of redemption in execution of a money decree obtained on a collateral security such as a bond or a covenant: *Bhuggobutty* v. *Shamachurn* (1); *Kamini* v. *Ramlochan* (2) and *Neerunjun* v. *Oopendro* (3). This rule was subsequently embodied in section 99 of the Transfer of Property Act but in a wider form. Under the rule before the Transfer of Property Act, the money decree to come within the operation of the rule must be one on a collateral security, *i. e.*, on a claim arising out of the mortgage transaction itself whereas the section extends it to an attachment arising out of any claim of the mortgagee whether arising under the mortgage or not.

With all respect, this extension of the rule does not seem to be a happy one as it is not based on any intelligible principle. The restricted rule was based on the *equitable* incident of the mortgage transaction according to which the mortgagee can enforce his rights under the mortgage including all sorts of claims in one exclusive way, *viz.*, the mortgage suit and he cannot indirectly enforce any claim under the mortgage by taking a money decree for it and thereby evading a mortgage suit. If he purchased in contravention of this rule, he still remains open to redemption. He cannot shake off his liability to be redeemed.

As said before, this view of the law prevailed before the Transfer of Property Act and was affirmed in several cases and was also

(1) (1876) I. L. R. 1 Calc. 337. (2) (1870) 5 B. L. R. 450.
(3) (1872) 10 B. L. R. 57.

approved of by the Judicial Committee in *Khiarajmal* v. *Diam* (1). "Their Lordships throw no doubt on the principle, which has been acted on in many cases in India . . . . . with the other safeguards usual in a suit on the mortgage."

In the present case the money decree or rather the rent decree in execution of which the mortgagee has purchased is one arising out of the mortgage claim. The rent payable was in lieu of interest and therefore the rent decree is in substance a money decree for the interest due on the mortgage money.

Hence it follows that the purchase by the mortgagee may not be a nullity but the title he takes is a redeemable one. This view also finds support from the observations of Mookerjee, J., in *Ashutosh* v. *Behari Lal* (2). To the same effect are also *Martand* v. *Dhondo* (3): *Ernsappa* v. *Commercial Bank* (4) and *Muthuraman* v. *Ettappasami* (5).

The principle underlying those decisions is a very old and sound principle of equity. It was unhappily extended in section 99 of the Transfer of Property Act, but the extension has been abandoned in the further amendment of the Act by which section 99 has been replaced by Or. XXXV, r. 14, Civil Procedure Code. However, that does not affect the present question. In the present case the mortgagee purchased in execution of a money decree on a claim arising under the mortgage. The mortgagor's right of redemption is, therefore, not affected by such a purchase.

No question of limitation arises because the right to redeem is governed by sixty years' period of limitation.

Then as regards the question of leave, before the Transfer of Property Act came into force the mortgagee could obtain leave of the Court to purchase and such leave, if given, would give him a good title to the property free from redemption, the reason being that the Court considering all the circumstances of the case gave him such leave with due regard to the protection of the interest of the mortgagor. The Court did for the mortgagor all that could be done for him in a mortgage suit, so that the objections about the mortgagee evading a mortgage suit do not arise. Since the passing of the Transfer of Property Act the Court cannot grant such leave as section 99 forbids such a sale. It is a mistake to think that the

(1) (1904) L. R. 32 I. A. 23; I. L. R. 32 Calc. 296 (316).
(2) (1907) I. L. R. 35 Calc. 61; 6 C. L. J. 320 F. B.
(3) (1897) I. L. R. 22 Bom. 624. (4) (1899) I. L. R. 23 Mad. 377.
(5) (1899) I. L. R. 22 Mad. 372.

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leave obtained by the decree-holder to bid is such a leave as referred to above. The leave must be given *qua* mortgagee which of course after the Transfer of Property Act cannot be given.

Babu Manmathanath Roy in reply.

C. A. V.

The following judgments were delivered:

August, 7.

Sanderson, C. J.—The question referred to the Full Bench is "Where a mortgagee has, in contravention of section 99 of the Transfer of Property Act attached the mortgaged property and brought it to sale and purchased it himself, can the mortgagor or his transferee without first getting the sale set aside, successfully maintain a suit for redemption of the property."

The plaintiff sued for redemption of what was described by the learned District Judge as a usufructuary mortgage bond in respect of 18 bighas of land executed in favour of Uttam Chandra Daw (defendant No. 1) by Sayemi Bibi, Takim Gazi and Tobraz (or Tamraj) Sardar on 6th April 1891. Possession was given to defendant U. C. Daw under the bond, but on the same day the mortgagors executed a Kabuliat in favour of the above-mentioned defendant whereby they attorned as tenants to him. Subsequently the mortgagors, as tenants, made default in payment of rent and the above-mentioned defendants sued Sayemi, Takim and Tobraz and obtained a decree. During the course of the hearing before the Full Bench a discussion arose as to the nature of the suit and the decree. The learned vakeel for the plaintiffs has supplied us with a translation of the decree. It is headed "Rent decree" and after reciting that the defendants had been given possession upon a stipulation to give half of the crops grown on the lands and half of the fruits of the trees on the land in lieu of interest and reciting that the three defendants had not given the plaintiff the share of the Aman paddy and that the plaintiff had brought the suit for Rs. 97 3 as. 4 gondas being the value at the rate of Rs. 36 per Bis of 2 Bis 14 Aris, plaintiff's half share of 5 Bis 8 Aris the entire produce of 12 bighas of land at the rate of 9 Aris per bigha, it was thereby ordered and decreed that the suit be decreed upon contest, that the plaintiff do recover from the defendants Rs. 98-14-15 as per account therein set out: the decree directed that the defendants should pay the above amount to the plaintiff within 15 days from the 18th May 1892, failing which the defendants would be ejected from the land. The decree was dated the 25th May 1892. In execution of this decree the abovementioned defendant U. C. Daw, purchased

the equity of redemption on the 5th December 1892: the sale was confirmed in January 1893, the sale certificate was granted in April 1893 and the defendant took possession in 1895.

Sayemi, Takim and Tobrax, died and any interest they had was inherited by Tobrax's widow, who was also the daughter of Sayemi. Tobrax's widow on the 25th April 1902 sold what purported to be the equity of redemption in respect of the mortgaged land to K. N. Bhattacharji, the father of the defendants Nos. 5 and 6. After the death of K. N. Bhattacharji, viz., on 16th May 1913 the defendants Nos. 5 and 6 sold their interest in the land to the plaintiffs. On the 20th November 1913 the plaintiffs brought this suit in which they claim the right to redeem the mortgage of the defendant U. C. Daw.

This case was before the Full Bench on a previous occasion and it was then considered material to have a finding upon the questions (1) whether the appellant (i.e., the defendant U. C. Daw) obtained the permission of the Court to bid at the sale of the equity of redemption on the 5th December 1892 and (2) whether the mortgagors consented to the sale thereof to the appellant, on the ground that if the mortgagee had obtained leave to bid he would be in the same position as an independent purchaser. If such leave had been obtained or if the mortgagors had consented to the sale, the question submitted to the Full Bench would not arise. Accordingly the Full Bench directed that the record of the Execution case No. 1128 of 1892 in the Court of the Munsiff at Basirhat should be sent to this Court with a finding by the lower appellate Court on the above mentioned two questions.

It appears that the record of the execution case was destroyed in accordance with the rules many years ago.

The learned District Judge held that there was no evidence relating to the first point but came to the conclusion that it would be an irregularity for the Court to allow the decree-holder to bid at the sale without taking the express permission of the Court and that therefore as he did bid at the sale it should be presumed that he had the permission of the Court to do so and he relied upon the provisions contained in section 114 of the Evidence Act and illustration (e). As to the 2nd question the learned Judge found that there was no evidence relating thereto and that in view of his first finding the second question was not material.

On the further hearing of this case by the Full Bench it was contended on behalf of the plaintiffs that the presumption that the decree-holder obtained permission to bid should not be drawn;

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first because it was contrary to the provision of section 99 of the Transfer of Property Act 1882 (which was in force at the time of the sale) for the decree-holder, who was the mortgagee to bring the property to sale otherwise than by instituting a suit under section 67 and (2nd) that even if leave to bid at the sale were given by the Court, it would have been beyond the jurisdiction of the Court to give such leave in view of the provisions of section 99 of the Transfer of Property Act.

Having regard to the terms of this section and in view of the absence of any evidence on the question, in my judgment it would not be right to draw the inference that leave was given to the defendant U. C. Daw to bid at the sale of the equity of redemption.

Having regard to the Full Bench decision in *A. Sikdar* v. *Bekari Lal Kirtania* (1) it must be taken that the sale of the equity of redemption in contravention of the terms of section 99 of the Transfer of Property Act was not a nullity, but an irregular and voidable sale, liable to be avoided on proof that the terms of that section had been contravened. It was contended however on behalf of the defendant U. C. Daw that the terms of this section had not been contravened, because the Defendant had not brought the property to sale in his capacity of mortgagee, but in his capacity of landlord, and that the amount decreed in his suit was due to him as landlord from the plaintiffs as tenants under the Kabuliat.

It was admitted that if the defendant U. C. Daw had purchased the equity of redemption in the capacity of landlord in execution of a decree for a claim, irrespective of the mortgage, he would be in the same position as a third party and the mortgagors must set aside the sale before they could sue for redemption : but it was contended on behalf of the plaintiffs that although the decree might, in form, be a decree for arrears of rent, it was in substance a decree for interest due under the mortgage. The decree is described as a "Rent decree," the amount decreed is the value of a certain quantity of paddy and costs and there is a direction in the decree that if the defendants failed to pay the amount within the time specified in the decree the defendants were to be ejected from the land. On these facts, it appears to me that the appellant did not bring the equity of redemption to sale in his capacity of mortgagee, but in his capacity of landlord, and if that be the correct view, that is sufficient for the disposal of this case and the appeal should be allowed. I hesitate however to base my judgment solely on this ground, for although the lower

(1) (1907) I. L. R. 35 Calc. 61; 6 C. L. J. 320.

appellate Court found that the suit was for rent, the point now relied upon by the plaintiffs in this suit, *viz.*, that although in form it was a suit for rent, it was in substance and reality a claim for arrears of interest under the mortgage, does not seem to have been considered.

And the learned Judges who referred the matter to the Full Bench seem to have assumed that the appellant brought the equity of redemption to sale in his capacity of mortgagee and in execution of a decree for the satisfaction of a claim arising under the mortgage. In view of this and as we have not a translation of the material documents, *viz.*, the mortgage bond, and the Kabuliat, before us, I think it is necessary to consider the case on the assumption made by the learned Judges who referred the matter to the Full Bench.

The learned vakeel for the plaintiff contended *first* that under the sale of 5th December, 1892, the equity of redemption did not pass to U. C. Daw and that the money paid by him at the sale should be treated as nothing more than a further advance by him on the security of the mortgage.

Secondly, that if the equity of redemption did pass by the sale to U. C. Daw, he held it as trustee for the mortgagors and their assignee, the plaintiffs who are entitled to redeem on payment of the mortgage-debt plus the money paid by the mortgagee at the sale and any money which may have been properly expended by the mortgagee, while in possession, for the protection and preservation of the mortgaged property.

In view of the decision of the Full Bench of this Court in *Ashutosh Sikdar* v. *Behari Lal Kirtania* (1), to which I have already referred, in my judgment the first point is untenable. It must now be held that the sale of 5th December, 1892, was not void, but merely voidable. No steps have been taken to set aside the sale in accordance with the prescribed procedure and the time for so doing has long since passed. Consequently the equity of redemption purchased by the appellant U. C. Daw at the sale passed to him and no title to the equity of redemption passed either by the conveyance of 25th April 1902 to K. M. Bhattacharjee or by the conveyance of 16th May 1913 to the plaintiffs. It should be noted that the learned vakeel for the plaintiffs said that he regarded his second point as the better of the two and it is obvious that the first is inconsistent with the second, which was based upon the allegation

(1) (1907) I. L. R. 35 Calc. 61; 6 C. L. J. 320.

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that the mortgagee held the equity of redemption as a trustee for the mortgagors.

With regard to the second point, assuming for the moment (but without deciding) that by reason of the sale of 5th December 1892 the appellant U. C. Daw became trustee of the equity of redemption for the mortgagors, it appears to me clear that this suit would not lie. The suit is based upon the ground that the plaintiffs are the owners of the equity of redemption and are therefore entitled to redeem the mortgaged property. Whereas this argument is based upon the assumption that the property in the equity of redemption passed by the sale to the appellant U. C. Daw. If that be so the the plaintiffs had no interest in the property except as "*cestui que trust*" and they could not sue for redemption. This is further made clear by the accounts which upon the basis of this argument would have to be taken as between trustee and *cestui que trust*, accounts which would be different from those taken in a suit for redemption.

Upon the above mentioned assumption the suit is really one to enforce a trust, and if it were treated as such it would be out of time, for article 148 of the Limitation Act of 1908 would not apply but article 120 would apply. The sale was in December 1892 and the suit was not brought until the 20th November 1913, viz. after a lapse of nearly 21 years.

These considerations show, in my judgment that the question referred to the Full Bench should be answered in the negative.

This conclusion does not, in my judgment, conflict with the principle laid down in the dictum of Lord Davey in *Khiarajmal* v. *Daim* (1) viz, "Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by obtaining a money decree for the mortgage debt, and, taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken and with the other safe-guards usual in a suit on the mortgage." The mortgagor's right in this respect is provided for in section 99 of the Transfer of Property Act, 1882, but inasmuch as it has been decided by the Full Bench of this Court (2) that a sale, though held in contravention of section 99, is not a nullity but is an irregular and voidable sale, liable to be set aside merely on proof that the terms of the section have been contravened, it follows that under the circumstances mentioned in the

(1) (1904) I. L. R. 32 Calc. 296 (316); 1 C. L. J. 584.

(2) (1910) 12 C. L. J. 574 (577).

question referred to the Full Bench, the mortgagor in order to establish and enforce his right of redemption and to have accounts taken as between mortgagor and mortgagee must get the sale set aside in accordance with the procedure and within the time prescribed, before he can sue for redemption.

In my judgment the question referred to the Full Bench should be answered in the negative, the appeal should be allowed and the suit should be dismissed with costs both in this Court (including the reference) and in the Courts below.

Woodroffe, J.:—As I said in *Pancham Lal* v. *Kishun Pershad* (1) the question which has been debated before us is open to argument but as this Bench is of opinion that a suit to redeem will not lie where there has been a sale and purchase by the mortgagee which has not been set aside I accept that view. Whether a suit in such a case to have it declared that the mortgagee purchaser is a trustee for the mortgagor will lie need not be decided because this is not such a case, and if it were, it would be barred for the suit is brought 21 years after the sale. In my opinion neither article 148 nor section 10 of the Limitation Act would apply to such a suit if maintainable. As the terms of article 148 show, it refers to a suit for redemption and not to a suit where the equity of redemption has passed out of the plaintiff who seeks to enforce a trust in his favour upon the taking of an account which is not that of an ordinary mortgage suit.

Mookerjee, J.—The subject matter of this litigation is a tract of land 18 Bighas in area, held in Mourashi Mokrari jote right by one Zahid Gazi under Jnanendranath Ray Chaudhuri and others. On the death of Zahid Gazi, the tenancy was inherited by three persons, who on the 6th April, 1891, mortgaged it by way of conditional sale to secure a loan of Rs. 170 taken from Uttam Chandra Daw, the first defendant in this suit (now appellant before us). Under the terms of the mortgage-instrument, the mortgagee became entitled to possession of the premises, and was to enjoy the profits in lieu of the interest which was fixed at the rate of Rs. 37-8 per cent per annum. The mortgage money was made repayable on the 12th April, 1898. On the date of execution of the mortgage, the mortgagors took a lease of the lands from the mortgagee. The lease recited that the mortgagee had taken possession and had agreed to let out the lands to the mortgagors, for the period of the mortgage, that is till the 12th April, 1898. The tenants were to cultivate the lands, take half the produce themselves and deliver the other half

(1) (1910) 12 C. L. J. 374 (377).

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to the lessors or Rs. 50 as the value thereof. The lease further contained a provision that if the tenants failed to deliver the produce or pay the money value thereof in due time, the lessor would be at liberty to eject them from the lands. On the 28th January, 1892, the lessor sued the lessees for value of crops due, and for ejectment if the sum decreed should not be paid within the time prescribed by the Court. The records of that suit have been destroyed, but as the decree made therein is described on the face of it as "Rent decree," there can be no doubt that the suit was treated as one for rent. The suit was decreed on the 18th May, 1892 for a sum of Rs. 98-14-9 and the decree contained a direction that the judgment-debtors should be ejected, if the amount adjudged due was not paid up within fifteen days. The sum was not paid, with the result that the decree was executed and the lessees were ejected on the 4th July, 1892. The tenancy thus came to an end. The decree-holders subsequently took out execution of the decree for realisation of the money due. On the 5th December 1892, the right, title and interest of the judgment-debtors in the jote (that is, the equity of redemption) was sold by auction and was purchased by the decree-holder himself; the sale was duly confirmed on the 6th January, 1893 and the sale certificate was granted to the purchaser on the 18th April, 1893; the equity of redemption thus became united with the interest of the mortgagee. On or about the 24th April, 1902, however, one of the mortgagors who had by inheritance taken the shares of the other two, professed to sell the equity of redemption to one Kshitinath Bhattacharyya for a sum of Rs. 81. On the 16th May, 1913, the sons of Kshitinath Bhattacharyya, who had died meanwhile, conveyed the equity of redemption to the plaintiffs for a sum of Rs. 350; the purchasers retained out of the consideration money Rs. 170 and undertook to pay the dues of the mortgagee. On the 20th November, 1913, the plaintiffs, on the strength of their purchase of the equity of redemption, instituted the present suit against the mortgagee for redemption and recovery of possession. The mortgagee resisted the claim on the ground that as the equity of redemption had vested in him on the 5th December, 1892, the plaintiffs had acquired no title thereto by their purchase and were consequently not competent to redeem the property. The Courts below have concurrently negatived this defence and have held, on the authority of *Pancham Lal* v. *Kishun Pershad* (1) that notwithstanding his purchase of the equity of redemption, the mortgagee was liable to be redeemed by the mort-

(1) (1910) 12 C. L. J. 574; 14 C. W. N. 579.

gagors or their representatives in interest. The mortgagee defendant has appealed to this Court. The appeal was heard in the first instance by Chitty and Walmsley JJ., who held that the decision in *Pancham Lal* v. *Kishun Pershad* (1), was inconsistent with that of the Full Bench in *Askutosh* v. *Behari Lal* (2) and consequently expressed a doubt as to its correctness They accordingly referred the following question to a Full Bench for decision.

"Where a mortgagee has, in contravention of Sec. 99 of the Transfer of Property Act, attached the mortgaged property and brought it to sale and purchased it himself, can the mortgagor or his transferee, without first getting the sale set aside, successfully maintain his suit for redemption of the property."

The matter was heard by a Full Bench (Sanderson C. J., Woodroffe J., Chitty J., Fletcher J. and Chatterjea J.), on the 20th November, 1918 when the Court gave the following direction :—

"We direct that the record in execution case No. 1128 of 1892 in the Court of the Munsiff of Bashirhat be sent up to this Court with every despatch with a finding by the lower appellate Court as to whether the appellant obtained the permission of the Court to bid at the sale of the equity of redemption on the 5th December 1892 or whether the mortgagor consented to the sale thereof to the appellant."

The District Judge has reported that the record of the execution case was destroyed in accordance with the rules many years ago, but he has held that on the principle deducible from illustration (*e*) to section 114 of the Indian Evidence Act, *viz.*, that the Court may presume that judicial and official acts have been regularly performed, the inference may legitimately be drawn that the mortgagee obtained the permission of the Court to bid at the sale of the equity of redemption on the 5th December, 1892. The case has now been placed before the present Full Bench for final disposal.

There has been considerable discussion at the Bar upon the question, whether the District Judge has correctly applied the presumption mentioned in section 114 of the Indian Evidence Act. On the one hand, we have been pressed to hold that, after the lapse of such a long period, the presumption may well be raised that the mortgagee decree holder obtained the requisite permission as was contemplated in section 294 of the Code of 1882 which has now been replaced by Order 21 Rule 72 Civil Procedure Code 1908 ; this is

(1) (1910) 12 C. L. J. 574 ; 14 C. W. N. 579.
(2) (1907) I. L. R. 35 Calc. 61 ; 6 C. L. J. 330.

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supported by the observation of Scott C. J. in *Sahadu* v. *Devlya* (1). We have been asked on the other hand to hold that as the purchase by the mortgagee was in direct contravention of section 99 of the Transfer of Property Act, it is highly improbable that the decree-holder could have ventured to ask for the leave of the Court. I am inclined to take the view that leave was not obtained, but, in my opinion, it is not necessary to determine definitely whether leave was or was not granted, because the rights of the parties are not affected by the answer which may be given.

It is indisputable that the sale in this case was held in contravention of section 99 of the Transfer of Property Act which was in force at the time and provided as follows :—

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale, otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure (1882) section 43."

The sale was not a nullity, but an irregular sale liable to be avoided, merely on proof that the terms of the section had been contravened : *Ashutosh* v. *Behari Lal* (2). It unquestionably operated to transfer the equity of redemption from the mortgagors to the mortgagee, but it might have been set aside at the instance of the judgment-debtors on an application under section 244 of the Civil Procedure Code, 1882. Such application was not made either before or after confirmation. The sale therefore became final and conclusive, and under section 316, Civil Procedure Code the title to the property sold (that is, the equity of redemption) vested in the purchaser from the date of confirmation, so far as regards the parties to that suit and persons claiming through or under them. The period of limitation for cancellation of the sale by an appropriate proceeding has long since expired, and as no fraud is proved, no question of extension of time can arise. *Prima facie*, then, the mortgagors lost the equity of redemption on the 6th January, 1893, and the conveyances of the 24th April, 1902 and 16th May 1913 passed no title to the successive transferees. In this view, the plaintiffs are not entitled to redeem the mortgage property. The right of redemption, no doubt, exists from the moment when the mortgage is made and the security is redeemable on payment of the debt during the subsistence of the mortgage. But the right to redeem is not a personal right ; it is an interest in the property

(1) (1911) 14 Bom L. R. 254.
(2) (1907) I. L. R. 35 Calc. 61 ; 6 C. L. J. 320.

mortgaged, so that when the equity of redemption has been sold away, the mortgagor can no longer exercise his right of redemption. This view has been adopted in *Dharanikota* v. *Budhapasu* (1); *Sahadu* v. *Devlya* (2); *Lal Bahadur* v. *Akharan Singh* (3) and *Pandit Seenarain* v. *Ramjatan* (4). These decisions are based on the now familiar doctrine that an irregular sale must be formally vacated and cannot be ignored as a nullity. This was enunciated in the clearest possible terms by the Judicial Committee in *Mallarjun* v. *Narahari* (5), where they reversed the judgment of the majority in *Erava* v. *Sidramappa* (6). In that case, a mortgagor sued to redeem, although the equity of redemption had been sold away in execution at the instance of a judgment creditor and had been purchased by the mortgagee. Lord Hobhouse explained that the sale was irregular, because held in contravention of the requirements of the Civil Procedure Code as to service of notice upon the representatives of the deceased judgment-debtor: but it was essential that the sale should first be set aside, as it was a sale held by a Court with jurisdiction. There is consequently no escape from the position that at the date of institution of this suit, the plaintiffs had acquired no title whatever to the equity of redemption and were not entitled to redeem.

A desperate attempt, however, has been made on behalf of the plaintiffs to take the case out of the operation of the principle just explained. It has been argued that the sale of the equity of redemption was held in execution of a decree for the satisfaction of a claim arising under the mortgage, that the mortgagee, purchaser at a sale held in these circumstances, took the property in trust for the mortgagor, and that he might accordingly be called upon at any time within 60 years (under article 148 of the Limitation Act) to submit to redemption. There is no solid foundation for this contention. The argument is based on the assertion that the sale took place in execution of a decree for the satisfaction of a claim arising under the mortgage. But, as has been already explained, the suit was for recovery of rent although the sum recovered was to be applied in satisfaction of interest, due on the mortgage, and it would be an abuse of language to maintain that the suit was for recovery of arrears of interest on the mortgage. Two instructive cases on this

(1) (1907) I. L. R. 30 Mad. 362. (2) (1911) 14 Bom. L. R. 254.
(3) (1915) I. L. R. 37 All. 165 F. B. (4) (1917) 2 Pat. L. J. 587.
(5) (1900) I. L. R. 25 Bom. 337; L. R. 29 I. A. 216.
(6) (1895) I. L. R. 21 Bom. 424 F. B.

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point are furnished by the decisions in *Anon* (1), and *Chimman Lal* v. *Bahadur Singh* (2). In the first of these cases, a mortgage and a lease were, as in the case before us, executed simultaneously. Sir John Edge, C. J. observed that the grant of such a lease by the mortgagee to his mortgagor had been invariably treated as a transaction in the nature of a lease and as putting the parties in exactly the same position as that in which they would have stood, if, instead of having been mortgagor and mortgagee they were the zemindar and any other person taking a lease of the land. In the second case, precisely the same view was adopted, and it was ruled that the effect of the Kabuliat was to establish between the parties the relationship of landlord and tenant with the result that a suit on the Kabuliat would lie only in a revenue Court. A similar view was taken in *Khuda Bakhsh* v. *Alimunissa* (3), and the earlier decisions in *Altaf Ali* v. *Lalta Prasad* (4) and *Imdad* v. *Badri* (5) must be deemed to have been decided on their special facts. In the case before us, the suit was apparently described as a suit for rent; this inference may safely be drawn from the description of the decree, as also from the entries in the Register of Suits. The decree was made obviously under section 66 of the Bengal Tenancy Act (which prescribes a period of grace for fifteen days) and ejectment was obtained under section 89. I feel no doubt that the sale cannot be deemed to have been held in execution of a decree for enforcement of a claim under the mortgage. This conclusion completely sweeps away the foundation for the argument of the plaintiffs respondents.

But even if we assume that the sale was held in execution of a decree arising out of a claim on the mortgage, the case for the plaintiffs is beset with difficulties. Their contention is that although the equity of redemption has been sold away, and it is no longer possible for the mortgagors to obtain a retransfer thereof by avoidance of the sale, they are still entitled to recover the property from the mortgagee on payment of the mortgage money and the purchase money at the execution sale. In support of this argument they have invoked the aid of a principle of equity enunciated by Lord Davey in *Khiarajmal* v. *Daim* (6) in the following terms:

"A mortgagee cannot, by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of

(1) (1897) I. L. R. 23 All. 341 note. (2) (1901) I. L. R. 23 All. 338.
(3) (1904) I. L. R. 27 All. 313. (4) (1897) I. L. R. 19 All. 496.
(5) (1898) I. L. R. 20 All. 401.
(6) (1904) I. L. R. 32 Calc. 296; L. R. 32 I. A. 23; 1 C. L. J. 584.

his right to redeem on accounts taken and with the other safeguards usual in a suit on the mortgage."

According to Lord Davey, this principle of equity had been acted on in many cases in India. One of the earliest cases where the doctrine was applied is that of *Kamini Debi* v. *Ramlochan Sirkar* (1). There Macpherson J. held that a mortgagee cannot, in execution of a simple decree for money (the repayment of which is secured by mortgage) properly attach and sell the mortgagor's equity of redemption in the property mortgaged; but, if he does so and purchases it himself, he becomes a trustee for the mortgagor against whom he cannot acquire an irredeemable title. Reliance was placed upon *Downes* v. *Grazebrook* (2), to show that where a mortgagee has a power of sale, if he sells in exercise of that power, he cannot himself purchase, that is to say, if he does purchase, he will be declared to be merely a trustee for the mortgagor. Reference was also made to the judgment of Norman J in *Ramlochan* v. *Kamini* (3); *Ramlochun* v. *Kamini* (4) and of Phear J. in *Brajanath* v. *Gobindmani* (5) [see also the judgment of Markby J. in *Nurunjun* v. *Oopendro* (6)]. The question arose again in the case of *Mahabir Pershad* v *Macnaghten* (7), and Lord Watson held that the decision of Macpherson J. in *Kamini* v. *Ramlochan* (1), could be supported, only in cases where the mortgagee purchased without leave of the Court, for leave to bid puts an end to the disability of the mortgagee and puts him in the same position as any independent purchaser. It may be assumed, then, that in 1882, at the time when the Transfer of Property Act was passed, the rule had been recognised by our Courts that where a mortgagee had obtained a money decree for the mortgage debt and had, without the leave of the Court, taken the equity of redemption in execution, he was, on equitable grounds, liable to be treated, notwithstanding his purchase, as a mortgagee holding the property in trust for the mortgagor. The question necessarily arises, what was the effect of section 99 of the Transfer of Property Act. The legislature recognised the prevailing rule of equity, but modified its application in two directions. In the first place, the mortgagee was prohibited to purchase the equity of redemption in execution of his own decree, whether it was a money decree for the mortgage debt or for a claim related

(1) (1870) 5 B. L. R. 450.
(2) (1817) 3 Mer. 200.
(3) (1867) 5 B. L. R. 460 note.
(4) (1868) 10 B. L. R. 60 note.
(5) (1869) 4 B. L. R. 83 O. C. J.
(6) (1872) 10 B. L. R. 57.
(7) (1889) I. L. R. 16 Calc. 682; L. R. 16 I. A. 107.

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thereto or whether it was a decree for a claim entirely unconnected therewith. In the second place, the prohibition was absolute, and the legislature did not contemplate a purchase by the mortgagee even with the leave of the Court. In these circumstances, the endeavour to engraft upon section 99 of the Transfer of Property Act, the pre-existing rule on the subject as discoverable from judicial decisions, is opposed to well-recognised principles of construction of statutes. What has been here attempted by the plaintiffs was emphatically condemned by Lord Herschell in *Bank of England* v. *Vagliano Bros.* (1); the purpose of the statute surely was that on a point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was and extracting it by a minute critical examination of the prior decisions. The utility of the legislative enactment would be almost entirely destroyed and the very object of embodying the rule in a Code frustrated, if the Court could be called upon to examine the antecedent decisions and to engraft the rule deducible therefrom on the statute. The mischief is well-illustrated by what has happened in the case before us. We were invited to consider the exact effect of the cases already mentioned as also other decisions (such as *Bhuggobutty* v. *Shamachurn* (1); *Martand* v. *Dhoyde* (3); *Erusappa* v. *Commercial Bank* (4); *Muthu* v. *Karuppan* (5) and to supplement the statutory rule by the previous law on the subject. This can only lead to confusion, as is shown by the divergence of opinion disclosed in the cases of *Muthu* v. *Karuppan* (5) and *Dharanikota* v. *Budharasu* (6) which were decided within a few weeks of each other and one learned judge was a party to both decisions. After the best consideration I have been able to give to the matter, I have come to the conclusion that the severity of the rule embodied in section 99 of the Transfer of Property Act should not be softened by invoking the aid of the pre-existing law on the subject. I am consequently unable to follow the decisions in *Pancham Lal* v. *Kishun Pershad* (7), and *Narayan* v. *Keshab* (8).

Apart from this, even if the contrary view were taken and the equitable principles enunciated in the earlier decisions could be applied, they would be of no assistance to the plaintiffs. The suit is framed as an ordinary redemption suit and not as a suit to

(1) (1891) App. Cas. 107 (145).
(2) (1876) I. L. R. 1 Calc. 337.
(3) (1897) I. L. R. 22 Bom. 624.
(4) (1899) I. L. R. 23 Mad. 377.
(5) (1907) I. L. R. 30 Mad. 313.
(6) (1907) I. L. R. 30 Mad. 362.
(7) (1910) 12 C. L. J. 574.
(8) (1918) 28 C. L. J. 151.

enforce a trust. In a suit so framed, a redemption decree can be made only in conformity with section 91 of the Transfer of Property Act. Such a decree, it was not disputed, could not meet the justice of the case, because the defendant could not be deprived of the property only on payment of the mortgage money.

It may be observed finally that section 99 of the Transfer of Property Act has now been replaced by a less comprehensive rule (Order 34 Rule 14 Civil Procedure Code). The disability of the mortgagee is restricted to cases where he purchases the equity of redemption at a sale held in execution of a decree for the payment of money in satisfaction of a claim arising under the mortgage. The mortgagee, if he has a claim against the mortgagor independent of the mortgage, thus has the same right that other creditors have, to realise it by the attachment and sale of the equity of redemption. In such a case, however, the decree-holder must obtain leave to bid under Order 21, Rule 72, and, when he has obtained leave, he is in the position of an independent purchaser: *Mahabir* v. *Macnaghten* (1); *Gunga Pershad* v. *Jawahir* (2). This differentiates the case of an execution sale from a private sale of the equity of redemption. There, as observed by Kindersley V. C. in *Gossip* v. *Wright* (3) the Court allows the parties, by an arrangement subsequent to the mortgage, to enter into a transaction by which the mortgagor sells or releases or conveys or gives up (call it what you will) his equity of redemption and makes the estate out and out the estate of the mortgagee. This has now been approved by the House of Lords in *Reeve* v. *Lisle* (4) where they affirmed the decision of the Court of Appeal in *Lisle* v. *Reeve* (5).

My answer to the question referred to the Full Bench is in the negative; where a mortgagee has in contravention of section 99 of the Transfer of Property Act attached the mortgaged property and brought it to sale and purchased it himself, the mortgagor or his transferee cannot successfully maintain a suit for redemption of the property without first getting the sale set aside.

In this view, the appeal must be allowed and the suit dismissed with costs in all the Courts.

N. R. Chatterjea, J.:—The question referred to the Full Bench is thus stated in the order of reference:—"Where a mortgagee has in contravention of section 99 of the Transfer of Property Act, attached the mortgaged property, and brought it to sale and

(1) (1889) I. L. R. 16 Calc. 682; L. R. 16 I. A. 107.
(2) (1891) I. L. R. 19 Calc. 4.
(3) (1863) 32 L. J. Ch. 648.
(4) (1902) App. Cas. 461.
(5) (1901) 1 Ch. 53.

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purchased it himself, can the mortgagor or his transferee without first getting the sale set aside successfully maintain a suit for redemption of the property."

It appears that the mortgagors on the 6th April 1891, mortgaged the property in dispute by way of conditional sale, under which the mortgagee was to hold possession and enjoy the usufruct of the property mortgaged by way of interest, On the same date the mortgagors executed a Kabuliat in favour of the mortgagee under which they were to hold the land mortgaged as tenants under the latter on payment of half the produce. It was also provided that on non-payment of the half the produce (or the price thereof, Rs. 50) they would be liable to be ejected. The mortgagors defaulted to pay the share of the crops, and the mortgagee thereupon brought a suit for rent and also for ejectment. He obtained a decree for rent and the decree contained a direction that the defendants should be ejected if the decretal amount was not paid within 15 days. The payment was not made and the decree was executed, and the defendants were ejected on the 4th July 1892. The mortgagee subsequently took out execution of the decree for rent and purchased the equity of redemption on the 5th December 1892. The sale was confirmed in January 1893, and possession was taken in 1895. The heirs of the morgagors sold the land to the father of the defendants 5 and 6 from whom the plaintiffs purchased it on the 16th May 1913, and on the 20th November 1913 brought the present suit for redemption,

A question arose as to whether the defendant obtained the leave of the Court to bid at the sale and the learned District Judge (to whom the question was referred for a finding) came to the conclusion that although there was no evidence on the point, (the execution records having been destroyed) there was a presumption that leave to bid was obtained. I am of opinion however that no such presumption can be drawn having regard to the provisions of section 99 of the Transfer of Property Act.

The first question for consideration is whether the decree obtained by the defendant (the mortgagee) was for the payment of money in satisfaction of a claim arising under the mortgage. It is contended on behalf of the appellant that although there was a Kabuliat executed by the mortgagor in favour of the mortgagee agreeing to hold the land as tenant under him, it was part of the same (mortgage) transaction, and the decree though in form a decree for rent in substance was a decree for arrears of interest due under the mortgage. I am of opinion however that the decree was for rent

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as it purported to be. It is true the arrangement was that the share of the crops which the mortgagee would get from the mortgagors would be appropriated as interest on the mortgage, but the legal relation between the parties after the execution of the Kabulyat was that of landlord and tenant. Had the mortgagee let out the land to a third party it could not be contended that the share of crops payable under the Kabulyat was not rent even though the same might be appropriated towards interest. The mere fact that the lands were let out to the mortgagor would not alter the relation between the parties. Moreover the fact that the decree contained a direction for ejectment (presumably under section 66 of the Bengal Tenancy Act) if the defendant failed to pay the decretal amount within the time specified, shows clearly that it was a decree for rent, because whatever the arrangement might be, the mortgagee could not (except on the footing of landlord and tenant) obtain a decree for ejectment against the mortgagor. I think therefore that the defendant purchased the equity of redemption at the sale as landlord and not as mortgagee.

It is admitted that if the sale at which the mortgagee purchased was in execution of decree in respect of a claim not arising under the mortgage, the mortgagee acquired the equity of redemption just as a third party would, and the plaintiff cannot redeem unless they got the sale set aside. As the decree for rent in my opinion was not in satisfaction of a claim arising under the mortgage, the defendant acquired an irredeemable title to the property by his purchase at the sale in execution of the decree, the sale never having been set aside. In my opinion therefore the suit fails on this ground, and it is unnecessary to consider the other questions raised in the case.

But even if it be held that the decree was in respect of a claim arising under the mortgage, I think the suit will fail, as the sale was never set aside. The contention of the plaintiffs is that the sale need not be set aside; the sale stands but that the mortgagee does not acquire an irredeemable title; he holds the mortgaged property as trustee for the mortgagors, and the latter can redeem on payment of the mortgage money plus the amount spent by the mortgagee in purchasing the property, and any other money which might have been spent by him for the protection of the property, in other words that the mortgagee by his purchase only adds to his security, and that the rule of equity which governed the relation between the parties before the sale subsists notwithstanding the sale. It is pointed out that the principle of equity *viz.*, that a mortgagee

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cannot by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligation as mortgagee or deprive the mortgagor of his right to redeem on accounts taken and with the other safe-guards usual in a suit on mortgage is referred to by the Judicial Committee in the case of *Khiarajmal* v. *Daim* (1). But this equity is recognized in section 99 of the Transfer of Property Act. It is now settled however by the decision of the Full Bench in the case of *Ashutosh Sikdar* v. *Behari Lal Kirtania*, (2) that a sale in contravention of the provisions of section 99 of the Transfer of Property Act is not void, but is merely voidable, and admittedly no steps were taken to have the sale set aside. It cannot therefore be contended that the equity of redemption subsists in the mortgagor even though the sale is not set aside.

As for the argument that the mortgagee by his purchase holds the property as trustee, the trust (assuming that there is any) must be enforced in a suit properly framed for the purpose, and within the period of limitation prescribed. The suit is not so framed; section 10 of the Limitation Act would not be applicable, and the present suit brought 21 years after the sale is barred by limitation. I would accordingly answer the question referred to in the negative.

Newbould J.—I agree.

A. T. M. *Appeal allowed.*

(1) (1904) I. L. R. 32 Calc. 296 (316). (2) (1907) I. L. R. 35 Calc. 61.

CRIMINAL REFERENCE.

Before Sir Asutosh Chaudhuri Knight, Judge, Mr. Justice Newbould, and Sir Syed Shamsul Huda, Knight, Judge.

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EMPEROR

v.

AKUB ALI MAZUMDAR AND OTHERS.*

Criminal Procedure Code (Act V of 1898), Sec. 423—Revision—Legality of conviction—Guilty, plea of—Mistake of law—Retrial.

* Undefended Criminal References Nos. 165, 166 and 167 of 1919 by S. K. Ghose, Esq., Sessions Judge of Tipperah, dated the 18th November, 1919, against an order of Mr. A. C. Chatterjee, Sub-Divisional officer of Chandpur, dated the 12th August, 1919, convicting the accused under section 15 (a) of the Petroleum Act.

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Per Chaudhuri and Shamsul Huda, JJ. : When a plea of guilty is passed on a mistake of law, it shall not be accepted : *Queen* v. *Mittun* (1) followed. It is incumbent on the Magistrate to try the accused on the merits.

Per Newbould, J. : The principle of section 412 of the Code of Criminal Procedure should ordinarily be applied in cases in which the appellate Court is asked to exercise its revisional powers.

Where a person has pleaded guilty and has been convicted on such plea, he waives his right to question the legality of his conviction : *Empress* v. *Jafar* (2) followed : *Queen* v. *Mittun* (1) distinguished.

If a plea of guilty should not be recorded, a retrial should be ordered by an appellate Court : *Queen* v. *Mittun* (1) followed.

References under section 438 of the Criminal Procedure Code.

The accused in the three cases were, tried under section 15 (a) of the Petroleum Act and sentenced to pay a fine of Rs. 10 each or in default to undergo one week's rigorous imprisonment. On appeal, the Sessions Judge made references to High Court. The references came before Newbould and Huda, JJ. who differed in opinion and passed following judgments :

December, 8.

Newbould, J.:—Each of these three accused was separately tried on a charge of keeping more than 300 tins of kerosine oil in his boat without a license or pass, an offence punishable under section 15 (a) of Act VIII of 1899 Each accused pleaded guilty and filed a written statement. The Magistrate after recording the plea of guilty adjourned the cases. At the next hearing after examining one Court witness in each case, he convicted each accused and sentanced them to pay a fine of Rs. 10 each.

The learned Sessions Judge of Tipperah has referred these cases with a recommendation that the convictions and sentences be set aside on the ground that the accused merely carried the Kerosine tins under the orders of the sub-agent of Messrs. Bullock Brothers and Co., who had a general license for the transport of Kerosine oil.

Differing with regret from my learned brother I would hold that we should not interfere in this case. There can be no doubt that the principle of section 412 Criminal Procedure Code should ordinarily be applied in cases in which we are asked to exercise our revisional powers. This section provides that where a person has pleaded guilty and has been convicted on such plea there shall be no appeal except as to the extent or legality of the sentence. I agree with the remarks of Sargent, J. in *Empress* v. *Jafar M. Talab* (2) and would hold that by their pleas of guilty the accused waived their right to question the legality of their convictions. The

(1) (1869) 11 W. R. Cr. 53. (2) (1880) I. L. R. 5 Bom. 85.

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case of *Queen* v. *Mittun Chowdhury* (1) seems to me distinguishable on the ground that it was held in that case that the accused never intended to plead guilty and the plea should not have been recorded. In the present case it has not been alleged by the accused in their petitions to the Sessions Judge that they did not intend to plead guilty. In none of the grounds taken it is suggested that the plea was wrongly recorded. As I read their written statements they were not inconsistent with the pleas of guilty but were filed in order to set out extenuating circumstances that might mitigate the sentences.

Further if the convictions be held to be bad on the ground that the pleas of guilty should not have been recorded, I think a retrial should be ordered as was done in the case of *Queen* v. *Mittun Chowdhury* (1). As the accused were convicted on their plea of guilty the question has not been investigated whether the license held by Bullock Brothers & Co. was sufficient to cover possession by the accused of an excess amount of Kerosine oil.

As my learned brother and I are divided in opinion the case will be submitted to the Hon'ble the Chief Justice in order that it may be laid before another Judge of the Court under section 429 read with the concluding portion of clause (1) of section 439 Criminal Procedure Code.

Shamsul Huda, J.:—The facts of the case are set out in the letter of reference submitted by the learned Sessions Judge to this Court. On the point of law I agree with him. I do not think it makes any difference that the accused pleaded guilty to the charge. The plea of guilty was accompanied with a statement in writing filed by the accused. In that statement the accused said that they worked for Bullock Bros. who had a license, that the accused were illiterate persons and were not aware that a pass was necessary and that in future they would take out a pass. The plea of guilty cannot be dissociated from the statement that accompanied it and taking that statement into consideration it seems to me that the plea was based on a mistake of law and should not have been accepted: *The Queen* v. *Mittun* (1).

I regret I am unable to agree with my learned brother in holding that we should refuse to interfere with the conviction and sentence in this case in the exercise of our revisional jurisdiction because a person who is convicted on his own plea cannot appeal against the conviction.

(1) (1869) 11 W. R. Cr. 53.

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Owing to this difference of opinion, the case was laid before Mr. Justice Chaudhuri, who delivered the following judgment:

Chaudhuri, J.:—These three cases have been referred to me under section 429 Criminal Procedure Code.

The three accused were separately summarily tried for having kept more than 300 tins of kerosine oil, each in his own boat, without a license or pass, which is an offence punishable under section 15A of Act VIII of 1899. The record shows that they pleaded guilty and filed written statements. The trying Magistrate examined one Hemanta Kumar Mukherjee, Station Master, on the point as to who took delivery of the oil at the railway station and he also appears to have examined the accused. There is no record of what the accused were asked and what they said other than a note in each case. He says "the oil belonged to Khamesh Chandra Rakkhit sub-agent of Messrs. Bullock Bros. & Co Limited." Each written statement is to the following effect "I work under Bullock Bros. They have a license. I do not know that a pass has to be taken under the rules. I am an ignorant man. In future I shall work after taking a pass. It is prayed that the Court will show kindness in doing justice. I have no objection to this Court trying me." It further appears from the record in Jalaladdi Chowkidar's case that a notice was issued on him on the 16th July 1919 to show cause on the 25th, why he was not to be prosecuted under section 15 A of the Petroleum Act (Act VIII of 1899) "for transporting without license about 400 tins of kerosine oil in his boat from the Hazigunge Railway Station to the Bazar." He showed cause and filed a petition on the 25th July to the effect that he did not trade in kerosine oil: that he only carried the oil from the railway station to the bazar in the dry season in gharries and in the rainy season in boats: that he used to take kerosine oil belonging to Bullock Bros. under orders of their officers to their godown: that he had done so for a considerable time: that Bullock Bros. had a transport license from Government and under that license he had been employed to take the oil from the railway station to the godown: that it was therefore not necessary for him to take any license.

All the accused clearly raised the same defence. The plea of guilty as recorded must be taken in connection with their written statements. I am not prepared to hold that there was really a plea of guilty. All they meant to admit was that they had not a license or pass, and that the oil was in their boat. The written statements

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make it perfectly clear that they were relying on the transport license of Bullock Bros, as exonerating them. There is also on the record a letter from Bullock Bros. which was filed with Jalaladdi's petition, that they hold a general transport license for the transport of oil throughout India and that the oil is under their control until it leaves the hands of their sub-agents. It also said that the oil in these cases was being conveyed to their sub-agent's godown and was covered by their license.

The plea of guilty in these cases to my mind is of no value and it was incumbent on the Magistrate to try them on their merits. He was dealing with illiterate man and ought to have been very careful. He has clearly failed to consider the defence raised in the written statements. The convictions and sentences ought therefore to be and are set aside. The fines if paid are to be refunded.

The question whether the license held by Bullock Bros. was sufficient to cover possession by the accused of an excess amount of kerosine oil has not been investigated. It is therefore left open to the Magistrate to proceed with a retrial if he thinks it necessary. I find it noted that the trying Magistrate wanted to see the general transport license of Bullock Bros Whether he saw it or not does not appear. There can be no difficulty in getting it from them. It should be asked to be produced and if found to cover the possession of the accused, the cases ought not to be proceeded with.

A. T. M. *Convictions set aside.*

CRIMINAL REVISION.

Before Mr. Justice Richardson and Sir Syed Shamsul Huda, Knight, Judge.

THE CHAIRMAN OF THE HOWRAH MUNICIPALITY

v.

BARADA PRASANNA PAIN.*

CRIMINAL. 1919. *January, 30.*

Professional license—Effect of not taking—Calcutta Municipal Act (III B. C. of 1899), Secs. 578, 631—Offence, when committed—Limitation—Acquittal, order of, if and when can be reviewed.

A pleader practised in a Court in the year 1917-18 without taking a license:

Held, that he was guilty of an offence against theprovisions of section 578 of the Calcutta Municipal Act on the last date of 1917-18, that is on the 31st March, 1918, and a complaint lodged within three months of that date was not barred under clause (1) of section 631.

Per Richardson, J.: The offence under section 578 of the Calcutta Municipal Act lies in the person exercising a profession after the 1st of July in any year without having the prescribed license. If the profession is so exercised on subsequent days, there may be a doubt, whether a separate offence is committed on each day or whether it is all one continuing offence.

If the profession is exercised on one day only the prosecution must be commenced within the following three months. If it is exercised on a number of days, whether the offence is a continuing one or not, the prosecution must be commenced within three months of the last of such days.

Per Shamsul Huda, J.: For the purpose of carrying on a pleader's profession, it is not necessary that he should every day conduct a case or attend or address the Court. For instance, the fact of keeping an office for the purpose of receiving his clients, giving them advice or being generally open to engagement as a pleader, will all constitute the carrying on of a pleader's profession.

Per Curiam: As a rule the High Court does not interfere with an order of acquittal. But when a case is not a criminal one in the strict sense of the term and concerns the interest of a public body, it interferes.

Application for revision by the Chairman of Howrah Municipality.

The material facts appear from the judgment.

Babus Manmatha Nath Mukherjee and *Satindra Nath Mukherjee* for the Petitioner.

Babus Bepin Chunder Mullick and *Profulla Chunder Ghose* for the Opposite Party.

* Criminal Revision No. 17 of 1919.

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Chairman of the Howrah Municipality v. Barada.

January, 30.

The judgments of the Court were as follows :

Shamsul-Huda, J.—This is an application against an order of acquittal. As a rule this Court is reluctant to interfere in such cases. But as this is not a criminal case in the strict sense of the term, as it concerns the interests of a public body and as it is we understand, one of several cases of the same nature which are now pending in the Court below, we have thought it necessary to examine the case on its merits.

The prosecution was against a pleader of the Howrah Court, for practising as a pleader without taking a license, under section 578 of the Calcutta Municipal Act, which has been extended to the Howrah Municipality. The Magistrate acquitted the accused on the ground that under section 631, clause 1, of the Act which is also extended to Howrah, the complaint should have been made within three months of the date of the commission of the offence. The learned Magistrate says that the pleader practically..... admitted that he had exercised his profession in 1917-18. If that be so he was guilty of an offence against the provisions of section 578 on the last date of that year i.e. on the 31st March 1918 and the complaint lodged within three months of that date was clearly not barred under clause (1) of section 631 and to save limitation it was not necessary to invoke the aid of clause (2) which was not in force in Howrah when the prosecution was committed. But clause (2) has the effect of extending and not shortening the period of limitation provided by clause (1).

The statement that the accused made before the Magistrate was that he carried on his profession in the year 1917-18, but not on every day of the year. I do not think that this is quite a straightforward statement. If he had carried on his profession in 1917-18, it is not intelligible to me how he could have exercised his profession on particular days of that year only. He perhaps meant that he was not actually conducting a case every day in that year. But for the purpose of carrying on a pleader's profession it is not necessary that he should every day conduct a case or attend or address the Court. For instance, the fact of keeping an office for the purpose of receiving his clients, giving them advice or being generally open to engagement as a pleader, will all constitute the carrying on of a pleader's profession. Giving the statement of the accused its proper effect it seems to me to amount to an unqualified admission that he carried on his profession throughout the year 1917-18. In this view of the case, I am of opinion that the prosecution is not barred.

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We accordingly convict the accused of an offence under section 578 of the Calcutta Municipal Act and impose upon him a fine of Rs. 50 (Rupees Fifty only) being twice the amount which he was liable to pay for his license.

Richardson, J.—I agree. I have only one word to add. As to the ground on which the Magistrate acquitted the petitioner, if we read section 578 apart from the provisions of section 631 the offence hereby created lies in the person exercising a profession after the 1st of July in any year without having the prescribed license. The offence therefore is committed and the law is broken on the first day on which the profession is so exercised. If the profession is so exercised on subsequent days, there may be a doubt, whether a separate offence is committed on each day or whether it is all one continuing offence. But it is not necessary to decide that. On the assumption that it is one offence begun on the first day it continues to be committed and the law continues to be broken on each subsequent day.

Then if we turn to the first clause of section 631, that clause limits the time within which a prosecution for an offence may be commenced. Complaint must be made before a Magistrate within three months next after the commission of the offence. If the profession is exercised on one day only the prosecution must be commenced within the following three months. If it is exercised on a number of days, whether the offence is a continuing one or not, the prosecution must be commenced within three months of the last of such days.

It is perfectly true that under clause 2 of section 578, when an offender has once been convicted and paid the fine imposed upon him, the offence is purged and the payment of the fine is to be taken in full satisfaction of the demand on account of such license. The offender who has paid his fine is thereafter in the same position as a person who has taken out his license in proper time. But it by no means follows from that provision that the prosecution must be commenced within three months of the first of a number of days on which the offender practises without a license. The offence as I have said is committed afresh or continues to be committed on every day on which he practises without a license and the prosecution may be commenced within three months of the last of such days. The contention of the learned pleader that there was only one offence, an offence complete on the first day, is wide of the mark.

The other question which arises is a pure question of fact, whether the petitioner did or did not practise up to the end of the

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Richardson, J.

Municipal year, that is up to the 31st March, 1918. I entirely agree in what my learned brother has said on this part of the case. The Magistrate has, in effect, come to the same conclusion when he says the petitioner admitted or practically admitted that he had exercised his profession during 1917 and 1918. That being so and the prosecution having been started within 3 months of the 31st March, 1918, it was not barred by the rule of limitation prescribed by the first clause of section 631.

We understand that clause 2 of section 631, has now been extended to the Howrah Municipal area and consequently there will be no difficulty such as has arisen in this case in future.

A. T. M. *Order of acquittal set aside.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge and Sir Earnest Edward Fletcher, Knight, Judge.

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1919.

December, 3.

NILKANTA GHOSE, RECEIVER

v.

SWARNAMOYEE DASSI AND OTHERS.*

Inherent power—Civil Procedure Code (Act V of 1908), Sec. 151—Appellate Court—Misapprehension as to result of suit.

On the 23rd May, 1919, a decree was passed on the Original Side of the High Court, allowing the claim of the plaintiff. On the 12th May, 1919, a receiver was appointed by the Alipur Court of the plaintiff's property. The receiver did not know of the suit until after the decree and the learned Judge of the High Court did not himself know when he passed his judgment on the 23rd May, of the appointment of receiver by the Alipur Court. An application was made by the receiver for substitution and for setting aside the order of dismissal of the suit and of the decree, dated the 23rd May. It however appeared that there was no order of dismissal of the suit. The learned Judge on the application thought that inasmuch as the suit was dismissed, he should exercise his discretion and refused the application:

Held, that the appellate Court should exercise the inherent power under section 151 of the Code of Civil Procedure to make such orders as might be necessary for the ends of justice.

* Appeal from Original Order No. 64 of 1919, against an order of Mr. Justice Greaves, dated the 23rd June, 1919.

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NILKANTA v. SWARNAMOYEE.

June, 23.

Appeal by the Receiver.

Suit for realisation of money.

The material facts appear from the judgment

The application was refused by the following judgment of

Greaves, J.:—This is an application by one Nilkanta Ghose, who has been appointed receiver of the estate of Jadunath Sircar deceased in Title suit No. 80 of 1918 of the Court of the Second Subordinate Judge of Alipore, for an order that the applicant, as such receiver, may be substituted as plaintiff in the records of this suit and that the order dismissing the suit and the decree, dated 23rd May, 1919, may be set aside except as relates to the direction as to payment of the costs of Babu Pannalal Dey and that the suit may be restored.

The facts are shortly as follows:—Srimati Swarnomoyi Dassi, as one of the legal personal representatives of Jadunath Sircar, commenced, with the representatives of the estate, a suit against the defendant J. C. Galstaun in the year 1916, being Suit No. 329 of that year. The suit came on for hearing before me on 23rd May last. The plaintiffs did not appear and I dismissed the suit and decreed in favour of the defendant a claim for a set off which he had pleaded in his written statement against the plaintiffs. The legal personal representatives of Jadunath Sircar apparently, after the institution of the suit, fell out among themselves and it became necessary, for an application to be made for an appointment of a receiver of the estate of Jadunath Sircar. An application was accordingly made to the Alipore Court and on 12th May, 1919 Nilkanta Ghose was appointed receiver of that estate. It is said that thereupon the plaintiffs' claim in this suit, which was a claim for rent, devolved upon and vested in the Receiver Nilkanta Ghose, hence he applies for the order which I have already stated.

The Code of Civil Procedure provides, in order 22, for the devolution or survivorship of rights of suit upon the death, marriage or insolvency of parties, and for the procedure to be adopted. That is to say, in the case of death, the right of substitution, if it survives to the representatives of the plaintiff or the defendant, can be exercised within the period stated in the order. Order 22, rule 10, provides that in other cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may by leave of the Court be continued by or against the person to or upon whom such interest has come or devolved, that is to say, in a case like the present, assuming that the right to sue for rent devolved on the

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Nilkanta v. Swarnamoyee.

Greaves, J.

receiver upon his appointment, he would be entitled, if he had come at the right time and the Court had thought fit, to be added as a party to the suit. It does not seem to me however, upon the reading of order 22, rule 10, that any right of substitution devolved upon him as of right by reason of his appointment: and I have to consider whether in the circumstances I ought to interfere. I do not think that I ought. If the applicant is right and the right to sue for and recover rent accrued to him upon his appointment on the 12th May 1919, he is not precluded from bringing a fresh suit, and so far as the question of set off is concerned, if he is right in saying that no valid or binding order could have been made against the plaintiffs after the date of his appointment, then he will be entitled to dispute that order if and when that comes to be executed. The suit has however already been dismissed and although I accept Nilkanta Ghose's statement that he did not know of the existence of the suit until after the decree, it seems to me that having regard to questions of limitation and so on which may have arisen in favour of the defendant I should not be justified in the circumstances in making the order I am asked to make. I must therefore refuse the application and the defendant will be entitled to the costs of the application.

Against this decision, the Receiver Applicant appealed.

Messrs. N. N. Sircar and *B. K. Lahiri* for the Appellant.

Messrs. Langford James and *W. Gregory* for the Respondents.

The judgments of the Court were as follows:

December, 3.

Sanderson, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Greaves. I think I may say at once that the judgment, judging from the terms of it, must have been given under some misapprehension, because the learned Judge seems to have been under the impression that there was an order dismissing the plaintiff's suit. He says in the first paragraph of his judgment "This is an application that the receiver may be substituted as plaintiff in the records of the suit and that the order dismissing the suit and the decree dated the 23rd May 1919 may be set aside except as relates to the direction as to payment of the costs of Babu Pannalal Dey and that the suit may be restored." Later on, towards the end of his judgment he says again "The suit has however already been dismissed and although I accept Nilkanta Ghose's statement that he did not know of the existence of the suit until after the decree" and so on. I do not think it is the learned Judge's fault. He evidently based his judgment upon the form of the ap-

plication which was, that the order of dismissal, and the decree dated the 23rd of May 1919, may be set aside except as it relates to the direction as to payment of the costs, and so on. We have the decree now before us and it appears that there was no order of dismissal. It appears therefrom that there was a declaration that there was due to the defendant in respect of his advance of Rs. 15,000 after debiting the rents, (which were the subject matter of the plaintiff's claim) and crediting the interest a sum of Rs. 7,190. Therefore, it appears that, far from dismissing the plaintiff's suit, the learned Judge treated the plaintiff's claim as having been admitted by the defendant, and apparently he deducted from the amount of the defendant's advance, that which was due to the plaintiff. The learned Judge thought that the matter was one for his discretion, and that inasmuch as the suit had been dismissed, questions of limitation might arise and that he ought therefore to exercise his discretion in refusing the application. Now, that we are made aware of the real facts of the case, and it appearing that the suit was not dismissed, I think we ought to exercise the power vested in us under section 151 of the Code of Civil Procedure the inherent power of the Court to make such orders as may be necessary for the ends of justice.

It appears that the decree of the learned Judge was made on the 23rd of May, 1919. Before that, the receiver had been appointed by the Alipore Court on the 12th of May, 1919. The learned Judge has found that the receiver did not know of this suit, until after the decree and it is clear that the learned Judge himself did not know when he gave his judgment on the 23rd of May, of the appointment of the receiver by the Alipore Court. Consequently, in my judgment, the matter should be set right, and the order which we propose to make is as follows: The decree of the 23rd of May, 1919, will be set aside. We direct that the Receiver should be added as a plaintiff to the suit and in case the present plaintiffs may desire to raise any point, of which we are at present not aware, we direct that the present plaintiffs, instead of remaining as plaintiffs in the suit, should be added as defendants: that will involve striking out their names as plaintiffs and adding them as defendants.

As regards the costs of the application before Mr Justice Greaves and of this appeal, we think that each party should bear his own costs. We bear in mind that Mr. James' client was not responsible for the receiver not being aware of the suit, nor was he responsible for the Court not being aware of the appointment of the receiver, on the other hand, when those facts were made known, his client did oppose

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the application of the receiver for proceeding with the suit. We think that the justice of the case will be met if we order that each party shall bear his own costs of the application in the Court below and of this appeal.

The costs of the receiver are to be taxed as between attorney and client.

The costs of the suit will be in the discretion of the learned Judge who tries the suit.

Mookerjee, J.—I agree.

Fletcher, J.—I agree.

Messrs. Nalini Nath Sett & Co.:—Attorneys for the Appellant.

Messrs. Morgan & Co.:—Attorneys for the Respondents.

A. T. M. *Case remanded.*

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge, and Sir Earnest Edward Fletcher, Knight, Judge.

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December, 4, 5.

CHIRANJILAL RAMLAL

v.

TULSIRAM JANKIDASS.*

Review—Civil Procedure Code (Act V of 1908), O. 47 Rr. 1, 4, 7—"Discovery of new and important matter or evidence"—Allegations to be strictly proved—Strict proof—New evidence—Appellate Court, power of—Opinion of Court.

Before a Court can exercise a jurisdiction vested in it to grant an application for review on the ground of new and important matter or evidence, it is incumbent on the Court to be satisfied with the allegation of the applicant that the evidence in question constituted new and important evidence within the meaning of rule 1 order 47 of the Code of Civil Procedure. The Court must further have strict proof of the allegation that the evidence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made.

If a Court without adjudication of the allegation that the evidence which the applicant seeks to produce was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, grants an

* Appeal from Original Order No. 69 of 1919, against an order of Mr. Justice Greaves, dated the 7th July, 1919.

application for review, the order is contrary to the provisions of rule 4 of order 47 of the Code of Civil Procedure.

It is competent to an appellate Court to finally deal with the matter on the materials on the record.

Per Sanderson, C. J.: The new evidence must be such that if adduced it would be practically conclusive; that is, evidence of such a class as to render it probable almost beyond doubt that the decision or judgment would be different.

Per Sanderson, C. J. and *Mookerjee, J.*:—The effect of the expression "discovery of new matter or evidence" in clause (b) of the proviso to rule 4 O. 47 of the Code of Civil Procedure, is the same as if the words used have been "new and important matter or evidence."

When an application for review has been granted, it is open to the appellant to impeach the propriety of the order on the ground of contravention of the provisions of clause (b) of the proviso to rule 4 order 47 of the Code of Civil Procedure.

Per Mookerjee, J.: A litigant who invokes the jurisdiction of a Court to grant a review must allege the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made. When an application has been made on this ground, it may be granted under rule 4, sub-rule (2) of order 47 of the Code of Civil Procedure if the Court is of opinion that the application for review should be granted. This rule is subject to proviso to rule 4.

The jurisdiction of the Court to grant a review depends upon the circumstances mentioned in rule 1 of order 47 of the Code of Civil procedure and rule 4 does not prescribe a different test.

Strict proof means proof according to the formalities of law. But proof according to the formalities of law does not imply merely an allegation in accordance with the formalities of law that the facts contemplated by rule 1 exist. The Court must be convinced that the materials placed before it in accordance with formalities of law do prove the existence of the facts alleged: *Akid Khondker v. Mahendra* (1) referred to.

Applications for review on the ground of discovery of new and important matter or evidence should be considered by Court with great caution.

Though rule 4 of order 47 states that when the Court is of opinion that an application for review should be granted, it shall grant the same, the opinion of the Court must be opinion according to law.

Per Fletcher, J.: The allegations must be strictly proved; that means 'proved' within the meaning of the Indian Evidence Act.

Appeal by the Plaintiffs.

Suit for a declaration that a contract passed by a broker was null and void and unenforceable and for other reliefs. The suit was decreed, by the following judgment of

Greaves, J.:—In this suit the plaintiff seeks for a declaration that a certain contract referred to in the plaint is void, inoperative and unenforceable, and also seeks an injunction restraining the

June, 4.

(1) (1915) I. L. R. 42 Calc. 830.

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Greaves, J.

defendant firm from enforcing or attempting to enforce the contract by means of arbitration proceedings before the Bengal Chamber of Commerce.

The contract in dispute is dated 31st January, 1898. It is numbered 14 and is concerned with one lakh yards of Hessian cloth, delivery to be in March and April 1918. The broker is one Baldeo Shahi, the seller under the contract is said to be the plaintiff firm, and the purchasers the defendant firm. The plaintiff's case, as already appears from what I have said, is that he never entered into this contract and that he is not liable thereunder. The only issue that arises is whether this contract was entered into by the plaintiff firm with the defendant firm.

On behalf of the plaintiff firm, Ramlal a member of the firm and who is in charge of the Calcutta branch, stated that his firm were commission agents and that they did not deal in Hessian but that as commission agents they sometimes got orders for Hessians from their constituents and executed them. He states that he had heard the name of the defendant firm but that he had never had any transactions with them. He stated that the alleged broker Baldeo Shahi was related to him, his daughter having married Ramlal's son, but he denied that he ever had any transaction in which Baldeo Shahi acted as broker, and he stated that this firm's brokers were Chiranjilal & Co., and Nursingdas, and he denied that he ever authorised Baldeo Shahi to enter into the contract. He stated that on the 4th February 1918 he received from one Jogesh Chunder Sen a pleader, the sold note in respect of the alleged contract and that he returned it, and he denied that he had any interview between the 31st January and the 4th February with the defendants or that he approached them with a view to arriving at a settlement. In cross-examination he stated that from the 31st January 1918 the Hessian market was fluctuating, both rising and falling, but that the fall was not so marked as the rise, and he stated that he did not notice the state of the market on the 31st January. He stated that on that day he had a report that the market had gone up to Rs. 32 and had come down to Rs. 31, had again risen to Rs. 32 and fallen to Rs. 31. He stated that this report was given to him in the evening between 4-30 to 5 o'clock by Nursingdas. He stated that on the 31st Baldeo Shahi came to see him at about 4 p.m. and stated that he had with him an offer for the purchase of one lakh yards of Hessian and that Baldeo Shahi asked him if his firm were ready to sell this amount and that he replied no. Ramlal stated that Baldeo Shahi told him that it was the defendant

firm who were ready and willing to buy this amount. He stated that Baldeo Shahi did not name any rate and that he simply told him that they were not willing to sell and that when this answer was given Baldeo Shahi went away. He stated that on that very day he had no goods to deal in and he said that if he had had an order from the Mofussil he might have entered into the contract but that he would not have done such a deal on behalf of his firm. He stated that on the third February Baldeo Shahi came to his Gadi, spoke of his coming on the 31st with the offer with regard to the one lakh yards of Hessian and asked him to accept the contract and said that the defendants had told him (Baldeo Shahi) that they would hold him liable. Ramlal stated that he told Baldeo Shahi that he could not accept the contract. He stated that he received the sold note on the 4th February through some solicitors.

The evidence of the next witness Nursingdass does not call for comment. On behalf of the defendant firm, Shibnarain, a member of the defendant firm, gave evidence. He stated that he knew Baldeo Shahi and that Baldeo Shahi passed a contract between his firm and the plaintiff firm on 31st January. He stated that this was near the Hessian market and that one Doolichand a broker, was close by at the time. He stated that Dooli Chand was offering him business in Hessian at Rs. 30-4 when Baldeo Shahi came up and entered into the contract in suit and he said that the thing was then made *pucca*. He stated that he had known Ramlal since 1965(s) when their places of business were near together and he stated that he asked Dooli Chand to go with Baldeo Shahi and see Ramlal and definitely settle the contract and he said that Dooli Chand returned and told him that the Saudah was completed. He said that this was about 3 p. m, and that the market was rising at that time and he produced the entries in his Saudah delivery book and in his Saudah ledger of the transaction in suit. He stated that on 1st February he met Ramlal at the Hessian market and that Ramlal asked him to take money by way of difference and settle the Saudah on the 31st with him and he stated that he replied that he could not do so. He stated that Ramlal wanted to settle as the market was rising. In cross-examination he stated that he got the bought note on the 4th February and that he did not send any confirmation letter on the 31st January and that sometimes they sent confirmation letters but not always. He stated that Dooli Chand was a broker but that if he was in the Gadi he turned his hand to what he was asked to do and he stated that Dooli Chand was paid no salary.

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The next witness Doolichand stated that he was a gunny broker and confirmed the last witness's account of the transaction of the 31st. He stated that Ram Lal was at the gunny market and that Shibnarain asked him to go and enquire of the plaintiff firm with regard to the contract and he stated that he went there at about 3-15 the Saudah having been made at about 3 p. m., and told Ramlal that the defendant firm had taken one lakh of his goods at Rs. 30 through Baldeo Shahi and that Ramlal replied "I have sold." He stated that at this time the market was rising and rose to Rs. 31-8 or Rs. 35. In cross examination he stated that he had had no transaction with Ram Lal or his firm but that he often saw Ramlal at the Hessian market. The book that he produced (Exhibit 3) he stated was a copy of another book.

This concludes the oral evidence, and it is necessary to refer a few letters which appear in the bundle of correspondence (Exhibit A). The first letter which calls for reference is one from Jogesh Chander Sen, a pleader of the Small Cause Court to the plaintiff firm stating that his client Baldeo Shahai was surprised at the plaintiff firm returning the contract without their signature on the slip and that he was instructed to send the sold note and ask them to sign the slip and return it. There is a reply to this letter on the 5th by the plaintiff firm's attorney Babu Kumar Krishna Duft denying that any instruction or authority were ever given to Baldeo Shahi to enter into the contract and returning the sold note. On the 9th February Messrs. Pugh and Company wrote to the plaintiff's attorney claiming on behalf of Baldeo Shahi brokerage in respect of the contract. I do not think it necessary to refer to any of the other letters in the correspondence or to the other exhibits in the case. On behalf of the defendants it is urged that the plaintiffs have produced no books which it is suggested if produced would show that they deal in Hessian themselves. It is also urged in support of their case that they have produced the bought note, and that the probability of their story is supported by the fact that Baldeo Shahi was a relative of Ram Lal and would not have been likely to act prejudicially to Ramlal in the matter. On behalf of the plaintiffs it is said that it is significant that there was delay with regard to the signing of the bought and sold notes which were not sent until either the 3rd or 4th February. I should say a word with regard to the market which the defendants claim supports their case. I think there is no doubt on the evidence that between the 31st January and the 4th February, the material dates, the market was rising. On the 31st January I have sales

at Rs. 32 and Rs. 29 whereas on the 31st there is one sale at Rs. 32 and two sales at Rs. 34-8 and Rs. 34-4. On the 1st there is a sale at Rs. 35-4. On the 2nd I have two sales at Rs. 37-8 and Rs. 35-8 and on the 4th a sale at Rs. 37-6. So I think there is no doubt that as from the 31st January the market for Hessians was rising.

I now deal with the issue. The onus of proof no doubt lies upon the defendants who are setting up the contract and it was only as an act of convenience to them, that their evidence was not called first. Now the conclusion I have come to is that the defendants have failed to discharge the onus of proof which lay upon them. Baldeo Shahi, whatever may be the reason, has not been called as a witness, and in his absence it does not seem to me that there is any evidence upon which I can rely that Baldeo Shahi was instructed by the plaintiffs or had authority from them to enter into the contract and apart from such evidence I do not think I am entitled to infer from the fact of the rising market the probability of such a contract as is alleged, having been entered into. So far as Dooli Chand's evidence is concerned, I am not prepared to accept it, and so far as the defendant Sewnarain asserts that he was asked by Ramlal on the 1st February to arrive at a settlement of the contract I am not prepared to accept that part of his evidence. I therefore decide the case on the ground that the onus of proof of establishing the contract which lay with the defendants, has not been discharged. Under these circumstances I think that the plaintiff is entitled to the declaration which he asks, namely, a declaration that the alleged contract of 31st January is unenforceable and he will be entitled as against the defendants to an injunction restraining them from proceeding to arbitration upon the alleged contract and the defendants must pay the costs of the plaintiff on scale No. 2.

Mr. Roy (for the plaintiff).—With regard to prayer 2 of my plaint, I ask for a decree for that

The Court.—No, I do not think so. You have put into Court certain monies. There will be an order of return of those monies.

Mr. Roy.—The money is with the attorney.

Mr. Chatterji (for the defendant).—I do not know whether you will allow them to take that money out until the appeal is filed.

The Court.—You must get a stay from the appeal Court if you desire to appeal. The money must be returned in the meantime.

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Mr. Chatterji.—We have put in certain entries in certain books. We may take out the books on putting in copies.

The Court.—Yes.

An application for review of judgment was then made on the ground of discovery of new and important evidence after the passing of the decree. A Rule was then issued, which was made absolute by the following order of

Greaves, J.:—Upon reading on the part of the defendant firm an order *nisi* made in this suit and dated the nineteeth day of June last and an affidavit of Amulya Charan Dass of the due service thereof affirmed on the twenty-third day of June last both filed on the twenty-third day of June last and an affidavit of Bisseswar Lall affirmed and filed this day and upon reading on the part of the plaintiff firm and an affidavit of Ram Lal affirmed and filed on the fourth day of July instant and the decree made in this suit and dated the fourth day of June last and upon hearing Mr. A. N. Chaulhuri (Mr. P. N. Chatterjee appearing with him) advocate for the defendant firm and Mr. H. D. Bose (Mr. A. K. Roy appearing with him) advocate for the plaintiff firm: It is ordered that this suit be placed on the peremptory list of suits for hearing after a fortnight from the date hereof for retrial on hearing the evidence of Baldeo Shahi in the pleadings in this suit mentioned as a witness on behalf of the defendant firm: And it is further ordered that the costs of and incidental to this application and of the said order *nisi* be costs in the cause.

Against this order, the plaintiffs appealed

Sir B. C. Mitter with him *Messrs. S. C. Ray* and *A. K. Ray* for the Appellants,

Messrs. A. N. Chowdhury and *P. N. Chatterjee* for the Respondents.

The judgments of the Court were as follows:

December, 5.

Sanderson, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Greaves and from an order made by him on the 7th day of July, 1919.

The application was made by the defendant firm asking that a decree which had been made by the learned Judge in the suit on the 4th of June, 1919, should be reviewed. The application was based upon the following ground, that the evidence of one Baldeo Sahay which was very relevant and most material could not be produced by the defendant firm after the exercise of due diligence at the time when the decree was passed. It was alleged that the defendants

believed that the evidence of Baldeo Sahay was of such a character that if it had been given at the said hearing it might possibly have altered the judgment. The suit was brought by the plaintiff for a declaration that a certain contract was void inoperative, unenforceable and of no effect, and that the defendants were not entitled to enforce the said contract or any rights, thereunder: The allegation was that the contract in question had been made through the individual to whom I have referred, Baldeo Sahai. He was not called as a witness at the trial. The result of the trial was that the learned Judge held that the defendants did not discharge the *onus* which lay upon them of proving the contract. Consequently he gave judgment in favour of the plaintiffs and a decree was drawn up in accordance with the judgment. That was the decree which the defendant firm applied to have reviewed. The learned Judge granted a Rule. The hearing of that Rule was on the 7th of July this year. The learned Judge delivered no judgment, but he said "I think I will hear his evidence." Then there was a discussion as to the date when the further hearing should be held. The learned Judge directed "Have it a fortnight hence." He then made the Rule absolute and ordered that costs should be costs in the cause. The result of making the Rule absolute was that the decree which had been drawn up in pursuance of his judgment was set aside. The order drawn up was as follows: It is ordered that this suit be placed on the peremptory list of suits for hearing after a fortnight from the date hereof for retrial for hearing the evidence of Baldeo Das as a witness on behalf of the defendant firm: The costs of that application and the order *nisi* were directed to be costs in the cause.

The learned counsel for the appellant has urged that the order of review which the learned Judge made is appealable, because he argued that the order granting the review was in contravention of the provisions of rule 4, order XLVII of the Civil Procedure Code and if the learned counsel is right in that contention, then it is clear that an appeal lies, because such an appeal is expressly given by order XLVII, rule of which is as follows:—

"(1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was (a) in contravention of the provisions of rule 2, (b) in contravention of the provisions of rule 4 ..... "Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit." Rule 4, sub-rule (2) is as follows:

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"Where the Court is of opinion that the application for review should be granted it shall grant the same: Provided that.....(b) no such application shall be granted on the ground of discovery of new matter or evidence which the appellant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, with out strict proof of such allegation." In order to see what is meant by "Discovery of new matter or evidence" mentioned in this rule, reference must be made to rule 1 of order XLVII which is the rule giving a right to the person aggrieved to apply for a review. That rule provides as follows: "Any person considering himself aggrieved (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, for (b) by a decree or order from which no appeal is allowed, or (c) by a decision on a reference from a Court of Small Causes], and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

The learned counsel argued first, that there must be an allegation such as is referred to in order XLVII rule 4, sub-rule (2) (b), and then there must be strict proof of such allegation. It was further urged that the allegation must contain a statement that the evidence which is relied upon has been discovered after the decree was passed: further, that it must be new evidence: *thirdly*, that it must be important evidence, and, *fourthly* that it could not be produced at the time when the decree was passed by the exercise of due diligence. He further urged that with regard to the discovery and with regard to the newness of the evidence the allegations made by the applicants in this case did not comply with the rule.

It appears that Baldeo Sahai had made an affidavit on the 23rd of August 1918, some months before the trial took place, which contained allegations with relation to the alleged making of the contract in question and the defendants were aware of the evidence which he would be able to give. Consequently, the learned counsel urged that his evidence was not new evidence within the meaning of the rule nor was there a discovery of the evidence after the decree was made, and that therefore the applicant had not complied with rule 4 sub rule (2) (b) of order XLVII: I agree with his contention

in that respect. Further he argued that even if there was a sufficient allegation, there was not strict proof of such allegation.

Now, the meaning of the words "Strict proof" has been considered by the late Chief Justice Sir Lawrence Jenkins and by my learned brother Mr. Justice Woodroffe in the case of *Akid Khondkar* v. *Mahendra Lal De* (1). The learned Chief Justice at page 839 said this, "Where there has been placed before that Court such evidence or other mode of proof as the law requires and permits, I cannot think that it was intended that on appeal under section 629" (the learned Chief Justice was then dealing with the Code of 1882) "it was to be open to the appeal Court to say though there has been legal evidence, and in that sense strict proof, that proof did not convince it though it convinced the Judge who heard the witnesses and therefore the application and the order granting the review were *ultra vires* and beyond the competence of the Court." I intend to say nothing which would in any sense derogate from what the learned Chief Justice said in that case. But the case which we are now considering differs from the case which was then before the learned Judges, because in my judgment in this case there is a material defect viz, that there was no finding by the learned Judge who heard this application for review that he was convinced by the proof which was put before him upon the material matters which it was necessary for him to consider in deciding whether he should grant the review or not. The learned Judge merely said "I think I will hear his evidence" He has not come to any finding as to whether there was a discovery of new evidence: he has not come to any finding as to whether that evidence was of such an important nature that he ought to grant a review; nor has he come to any finding as to whether due diligence was exercised by the defendants, with regard to the production of such evidence at the trial. The result is that in my judgment the order for review was made in contravention of rule 4 order XLVII of the Civil Procedure Code. Consequently, there is a right of appeal.

There being a right of appeal, the next question that I have to consider is whether the order of the learned Judge should be upheld or set aside.

In my judgment there is no doubt that this order should be set aside. In my judgment the defendants have not shown any ground which would justify this Court in making an order that the evidence of Baldeo Sahay should be taken on a re-hearing.

(1) (1915) I. L. R. 42 Calc. 830.

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With regard to the kind of evidence which is necessary in an application of this kind, I need not say any thing because my learned brother, Mr. Justice Mookerjee and I had to consider this point, and we dealt with it in the case of *Nandalal Mullick* v. *Panchanan Mukerjee* (1). I do not intend to add anything to what I said in my judgment in that case. The facts of this case are such as to convince me that the evidence which the defendants desired to put before the Court in no way comes within the ruling which we laid down in that case. As regards the class of new evidence, the rule is that the new evidence must be such that if adduced it would be practically conclusive,—that is, evidence of such a class as to render it probable almost beyond doubt that the decision or judgment would be different. What are the facts in this case? We find that the defendant firm in the application which they made to the Court could not say more than that if the evidence had been given at the hearing it might "possibly" have altered the judgment—an allegation which is not sufficient to support the application. Then again, as to what took place at the trial when there was some discussion about the calling of the individual in question, I find a statement in the affidavit of Ramlal, a member of the plaintiff's firm, which is not denied by the affidavit put in in reply thereto, to this effect: "When the case came up for hearing on the 4th June last, not only no application for adjournment of the case on behalf of the defendant firm on account of its inability to arrest the said Baldeo Dass was made, but on the contrary the learned counsel appearing for the defendant firm went on to the trial of this suit held herein and expressly stated to the Court that Baldeo could not be produced, and even if he could be produced, no reliance could be placed upon his evidence he having given his statement to both sides." That is the man, with respect to whose evidence this application was made, in order that a further hearing of this case should take place to see whether his evidence would bring about a different decision. In my judgment it cannot be said that Baldeo Dass's evidence which was described by the defendant's learned counsel as being evidence upon which no reliance should be placed, is evidence which would be practically conclusive or which would render it probable almost beyond doubt that the decision would be different.

For these reasons on the merits, in my judgment this appeal should be allowed, and the order for review which was made, by my learned brother Mr. Justice Greaves should be set aside, and

(1) (1917) I. L. R. 45 Calc. 60; 26 C. L. J. 187.

that the defendant firm should pay the costs of this appeal and of the application in the Court below.

Mookerjee, J.:—I agree that the order made by Mr. Justice Greaves on the application for review cannot be supported. The suit was instituted on the 19th August 1918 for a declaration that a contract between the parties was void, inoperative, unenforceable and of no effect, and for an injunction to restrain the arbitration proceedings pending before the Bengal Chamber of Commerce. The suit was decreed on the 14th June, 1919. On the 19th June the defendant made an application for review of the decree on the ground that the evidence of one Baldeo Sahai which was very relevant and most material could not be produced by him at the trial after the exercise of due diligence. A Rule was granted on the same day. The Rule was made absolute on the 7th July, 1919. An order was subsequently drawn up in the following terms: "It is ordered that this suit be placed on the peremptory list of suits for hearing after a fortnight from the date hereof for retrial on hearing the evidence of Baldeo Sahai in the pleading in this suit mentioned as a witness on behalf of the defendant firm." It cannot be disputed that the effect of this order was to set aside the decree made on the 4th June, 1919. The plaintiffs have now appealed against the order made on the application for review.

The appeal is sought to be supported on the ground that the application for review was granted in contravention of the provisions of rule 4 of order xlvii of the Code. Rule (1) of that order provides that "Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.....desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order." It is clear that the litigant who invokes the jurisdiction of the Court to grant a review must allege the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made. When an application has been made on this ground, it may be granted under rule 4, sub rule (2), if the Court is of opinion that the application for review should be granted. There is however an important proviso in these terms:—

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"No such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation." It will be observed that whereas the expression used in rules 1 and 2 is "New and important matter or evidence" the expression in clause (b) of the proviso to rule 4 is "Discovery of new matter or evidence." In my opinion, the effect of this expression is the same as if the words used had been "New and important matter or evidence." The jurisdiction of the Court to grant a review depends upon the circumstances mentioned in rule 1; and it cannot be urged that rule 4 intended to prescribe a different test. Rule 7 next provides that an order granting an application for review may be objected to on the ground that the application was in contravention of the provisions of rule 4. Consequently when, as in the case before us, an application for review has been granted, it is open to the appellant to impeach the propriety of the order on the ground of contravention of the provisions of clause (b) of the proviso to rule 4. The appellant here argues that the application has been granted on the ground of discovery of new matter or evidence which the applicant urged was not within his knowledge or could not be adduced by him, when the decree or order was passed or made, without strict proof of such allegation. In my opinion, it is plain that this objection is well founded. Before a Court can exercise the jurisdiction vested in it to grant an application for review on the ground of discovery of new and important matter or evidence, it is incumbent on the Court to be satisfied with the allegation of the applicant that the evidence in question constituted new and important evidence within the meaning of rule 1. There is no adjudication by the learned Judge in this case that he was so satisfied. The Court must further have strict proof of the allegation that the evidence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made. The learned Judge in the case before us has not stated that there was in his opinion strict proof of the allegation. The expression "Strict proof" was considered by this Court in the case of *Akhé Khondkar* v. *Mahendra Lal De* (1) and the substance of the decision of Sir Lawrence Jenkins was that strict proof means proof according to the formalities of the law. But proof according to the formalities of the law does not imply merely an allegation in accordance with

(1) (1915) I L. R. 42 Calc. 830.

the formalities of the law that the facts contemplated by rule 1 exist. The Court must be convinced that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. If any other view were taken, the result would follow that a party would be entitled to an order for review in his favour upon the mere allegation that the evidence which he seeks to produce was not within his knowledge or could not be produced by him at the time when the decree was passed. In my opinion, it is the duty of the Court to come to the conclusion, before it grants the application, that the evidence in question is new and important and that it was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made. If a Court without such adjudication grants an application for review, the order is in my opinion contrary to the provisions of rule 4 and cannot be supported. In the present case, the order made by Mr. Justice Greaves is open to that objection and must consequently be set aside.

The question next arises as to whether this Court should consider the materials on the record and come to a decision or whether the matter should be remitted to the learned Judge. There can be no doubt that it is competent to this Court to deal with the matter finally and it is in the best interest of the parties that we should so dispose of the matter. Now when the materials on the record are considered, it becomes plain that the application for review should never have been granted. As regards the point whether the evidence was important evidence within the meaning of rule 1, it is clear that the answer must be against the applicant. The word 'Important' serves the purpose explained in the leading decisions on the subject mentioned in the judgment of this Court in the case of *Nandalal Mullick* v. *Panchanan Mukerjee* (1). In that case reference was made by the learned Chief Justice to the decisions in *Young* v. *Kershaw* (2), and *Brown* v. *Dean* (3). In the first of these cases Smith, L. J. observed that the new evidence must be such as would have been conclusive of the case if it had been adduced at the trial. Collins, L J. similarly observed that the party asking for the new trial must show that there was no remissness on his part in adducing all possible evidence at the trial; and as to the class of new evidence the rule is that the new evidence must be such that if adduced it would be practically conclusive that is, evidence of such a class as to render it probable almost beyond doubt that the verdict

(1) (1917) I. L. R. 45 Calc. 60; 26 C. L. J. 187.
(2) (1899) 81 L. J. 531; 16 T. L. R. 52. (3) (1910) A. C. 373.

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would be different. In the second case, *Brown* v. *Dean* (1), Lord Loreburn observed that the new evidence must at least be such as is presumably to be believed and if believed would be conclusive. I am not unmindful that in this latter case Lord Shaw sounded a modified note. He observed that it was possible to figure cases in which evidence might not be conclusive but might be so gravely material and so clearly relevant as to entitle the Court to say that that material and relevant fact should have been before the jury in giving its decision. But, whether we adopt the language used by Collins, L. J. or by Lord Shaw, it is clear that the applicant in the case before us must fail. The evidence which he seeks to produce now is not *important* evidence in any sense of the term. It is undoubtedly not *conclusive* evidence, as on the materials on the record it is plain that the person had made contradictory statements before the trial and that at the trial his counsel declared that he could place no reliance on him by reason of such circumstance. It is impossible for us to hold that evidence of this description would be such evidence as would justify the grant of an application for review.

I desire to emphasise what was said in the case of *Nandalal Mullick* v. *Panchanan* (2) that applications for review on the ground of discovery of new and important matter or evidence should be considered with great caution. In the case before us there can be no doubt that the application has been granted very lightly. No doubt rule 4 of order 47 states that where the Court is of opinion that an application for review should be granted it shall grant the same. But the opinion of the Court must be opinion according to law, and the principles laid down in the case mentioned are rules which must be borne in mind before applications of this character are granted. I have no doubt at all that we should as a Court of appeal set aside the order of the learned Judge in order to secure for the plaintiff the fruits of the lawful judgment which he obtained at the first trial.

Fletcher J.—I am of the same opinion and I have very little to add. The first question in this case is, does an appeal lie from the order made by Mr. Justice Greaves. It seems to me clear that it does. Order XLVII rule 7 Code of Civil Procedure gives a right of appeal in case a review is granted in contravention of the provisions of rule 4. Did the learned Judge in this case grant the order for review in contravention of the provisions of order XLVII rule 4? It seems to me quite clear that he contravened all the pro-

(1) (1910) A. C. 373. (2) (1917) I. L. R. 45 Calc. 60.

visions of order XLVII rule 4 (2). The application ought to have been rejected *in limine*, as it did not contain the proper allegations provided for by the terms of the order; and, also I think that the learned Judge, even if the application contained the proper allegations, was bound, before he could proceed to make an order granting the review, to find that these allegations were strictly proved; that means "proved" within the meaning of the Indian Evidence Act. "Proved" is defined in section 3 of the Act as follows: "A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." The learned Judge in this case has altogether failed to consider whether the allegations were proved, and the only remark that he has made is that he thinks that he will hear the evidence of this additional witness. It is quite clear that that does not satisfy the provisions contained in order XLVII as to granting a review on the grounds set up in this case. In that view it is quite clear that an appeal lay from the judgment of the learned Judge. If an appeal lay, I agree with the remarks of the learned Chief Justice that no case has been established on which the Court ought to grant a review on the discovery of new and important matter or evidence mentioned in order XLVII. I agree, therefore, that the appeal should be allowed.

Babu Kumar Krishna Dutt: Attorney for the Appellants.

Messrs. Mitter and Bural: Attorneys for the Respondents.

A. T. M. *Appeal allowed.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge, and Sir Earnest Edward Fletcher, Knight, Judge.

CIVIL. 1919. *December, 3, 4.*

LADURAM NATHMULL

v.

NANDALAL KARURI AND OTHERS*.

Jurisdiction—Arbitration, reference to—Civil Procedure Code (Act V of 1908), Sch. II Para 1—All the matters in suit—All the parties interested must join in the application—Party not appearing in the suit, consent of—Order of reference made without consent of all parties interested, if valid—Award made on such reference, if valid—Rules regarding jurisdiction—Hardship—Technicality.

A Court has no jurisdiction to make an order of reference under para. 1, schedule II of the Code of Civil Procedure, without the consent of all the parties including the party who does not appear, interested. If an order be made without the consent of such non-appearing party, it is illegal and an award made on such reference is also illegal.

Per Mookerjee, J.—When a Court is called upon to decide a matter of jurisdiction, no question of hardship, no consideration of technicality can be permitted to affect the judgment.

The rules relating to jurisdiction should be strictly construed and the Court should be astute not to permit litigants to circumvent such provisions of the Code.

Appeals by the Defendant.

Suits were brought by one Nandalal Karuri against the Official Assignee of Calcutta, Nilmony Das, an insolvent and a firm called Laduram Nathmull. Nandalal was a mortgagor, Nilmony was the mortgagee and Laduram Nathmull were sub-mortgagees from Nilmony. The suits were in the nature of redemption. Petitions were filed by the plaintiff praying that all matters in difference in the suits including the question of costs be referred to the sole arbitration of Mr. A. N. Chaudhuri, Barrister-at-law. The petition alleged that the defendant Nilmony Das being an insolvent had no interest in the suit inasmuch as all his interest in the property vested in the Official Assignee by operation of law. The order followed the petition and provided that with the consent of all the parties as aforesaid, all matters in difference in this suit and of the reference, be referred to the final decision of Mr. A. N. Chaudhuri, Bar-at-Law. The parties aforesaid were the official assignee, Laduram Nathmull

* Appeals from Original Orders Nos. 65 to 68 of 1919, against the orders of Mr. Justice Rankin, dated the 9th June, 1919.

and the plaintiff and the consent of Nilmony was not obtained. An award was made, on which the following order was made by

Rankin, J.—In Suit No. 430 of 1918 I came to the conclusion that it was not possible under rule 1 of the 2nd schedule to the Code to order a reference of "All matters in difference in this suit including the question of costs of this suit" as the order of 17th March 1918 purported to do save by and with the consent of all existing parties to the suit regardless of whether any of them had or had not entered an appearance. If an improper or unnecessary party has been impleaded and it is desired to proceed without his consent he must either be dismissed from the action or the order of reference must be more guarded in its terms.

The award which has resulted under the order must be set aside if the order was without jurisdiction and it is irrelevant to consider whether the arbitrator has or has not purported to affect the party who did not consent.

If in the present case I could be satisfied that the learned Judge who made the order of 17th March 1918 had considered and intended to decide the point of law arising from the absence of consent by the insolvent, I should think it my duty to follow that decision. But though the fact that this consent was absent was placed before him I feel sure that the point of law was not; if only for the reason that, had it been present to anybody's mind, the difficulty would have been surmounted by the simple process of dismissing the insolvent from the action. It does not seem to have been present to the mind of any one until it was taken by Mr. Sircar and adopted by other counsel in the same interest at the hearing of these motions. The point having been taken, my duty is, I think, laid down for me and I must make the same order as was made by Fletcher J., and held to be right by the Court of appeal in *Sath Dooly Chand* v. *Musaji* (1). That case prevents me from holding that the parties have agreed to treat the insolvent as having no interest and that they cannot go back upon this agreement as between themselves. The question is one of jurisdiction and the conditions of jurisdiction. If these are not satisfied I cannot refuse to notice the defect nor will I accept something less as sufficient. These conditions are simple and clear and should be kept so. Technicality will in the end be less troublesome if they are exacted firmly and in all cases, than if they are tempered or modified in the hope of avoiding technicality. Rule 1 of the 2nd schedule is to be obeyed, not merely to be placated.

(1) (1916) 25 C. L. J. 339.

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Rankin, J.

As regards suit No. 739 a motion has, since I gave judgment on the main points, been launched by the Official Assignee and Karuri asking me to set aside the order of reference dated 17th March 1918 which was made at the same time as the order which I am setting aside in suit No. 430. The affidavits in opposition to that motion stoutly deny that there was any mistake and emphasise the fact that these orders were made on separate petitions in the two suits. They also contend that the mistake if any was one of law and not of fact. I still think it perfectly clear that the only intention in the mind of any of the consenting parties was to dispose, by reference to one and the same arbitrator and once and for of all the entire subject matter which was being litigated in the two actions. This intention fails altogether—not in part only but entirely—if the order in suit No. 430 be set aside. This failure is because the parties thought that suit No. 430 was being referred when it was not being referred. The distinction between mistake of law and mistake of fact is of no service to the parties who desire to uphold the award. The agreement in question was about legal proceedings and the present position is not that the parties have done what they intended to do as regards these proceedings—to send them all to arbitration—and have discovered that this has a different legal consequence from what they thought. The position is that they have not sent them all to arbitration : as regards one suit the gentleman named was not arbitrator at all : thinking that he was the parties referred to him the other.

It is further objected that as I cannot now make an order of review, I cannot in any proceeding in this suit (No. 739) set aside the order of reference, and that a separate suit must be brought for the purpose.

It is contended in reply to this objection, first, that apart from an order of review I can discharge the order of reference ; and secondly that in any case I can refuse to confirm the award. In my opinion the Court can in the same action in which an interlocutory order has been made by consent, set aside that order on the ground of mistake vitiating the agreement upon which the order was based *Mullins* v. *Howell* (1) ; *Ainsworth* v. *Wilding* (2). This doctrine was affirmed by the Lord Chief Justice in *Neale* v. *Gordon Lennox* (3) in the case of an order of reference. The Court of Appeal which reversed that decision expressly agreed with the principle of the cases above cited. In the House of

(1) (1879) 11 Ch. D. 763. (2) (1896) 1 Ch. 673.
(3) (1902) 1 K. B. 838.

Lords *Keale* v. *Gordon Lennox* (1) where the judgment of the Lord Chief Justice was upheld, Lord Lindley expressed himself in terms which certainly cover the same principle if they do not go further.

The Indian cases satisfy me that independently of the statutory right to apply for a review the Court has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties. *Atukootosk* v. *Tara Prasanna* (2). *Nistarini* v. *Nundo* (3); *Biraj Mohun* v. *Chinta Moni* (4); *Bhuthnath* v. *Ram* (5); *Fatmabai* v. *Senbai* (6). This jurisdiction is part of the ordinary law; the authority for it is to be found in English cases; and the limitations which in England have been set to its exercise have been adopted here. The English cases cited and followed are, e.g., *Flower* v. *Lloyd* (7); *Gilbert* v. *Endean* (8); *Huddersfield Banking Co.* v. *Henry Lister and Sons* (9); *Ainsworth* v. *Wilding* (10). Now these cases were none of them concerned with merely interlocutory orders and I have found no Indian cases in which such orders were being challenged. In many of the Indian cases, the English rule has been affirmed that a separate suit is necessary. But the Courts in India have never purported to vary the English rule and have never so far as I can find applied it where it is not applicable or considered it with special reference to interlocutory orders. *Flower* v. *Lloyd* (7) and *Gilbert* v. *Endean* (8) were decisions to which Sir George Jessel was a party and the latter was cited to him in *Mullins* v. *Howell* (11) where he held the rule inapplicable to interlocutory orders. I feel on sound ground therefore in holding that the rule in India is the same as the rule in England and in refusing to make it into something different.

If there be any special danger in India of the principle which I have accepted being abused I think the observations of Lord Halsbury in *Keale* v. *Gordon Lennox* (1) are in point and in any case to shorten the arm of the Court is not the remedy. The Court is not bound to act on motion, where a more formal proceeding is desirable, though *Doe d. Lord Carlisle* v. *Bailliff* (12) seems to show that this is no new application of the general power of the Court to act on motion in a proper case.

(1) (1902) A. C. 465 (473)
(2) (1884) I. L. R. 10 Calc. 612.
(3) (1899) I. L. R. 26 Calc. 891.
(4) (1901) 5 C. W. N. 877.
(5) (1902) 6 C. W. N. 82.
(6) (1911) I. I. R. 36 Bom. 77.
(7) (1877) 6 Ch. D. 297.
(8) (1878) 9 Ch. D. 259.
(9) (1895) 2 Ch. 273.
(10) (1896) 1 Ch. 673.
(11) (1879) 11 Ch. D. 763.
(12) (1811) 3 Taunt 378.

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Now I have before me, apart from the two awards set down by the officers of the Court for confirmation, the following applications :

First a motion brought by notice dated 24th April 1919 in the Insolvency of Nilmoni Das (No. 20 of 1918) on the part of Provasanker & Co., as creditors, asking for directions to be given to the Official Assignee. I make an order on that motion that upon giving a proper indemnity to the Official Assignee to the satisfaction of the Registrar in Insolvency these creditors be given the conduct of all subsequent proceedings in suits Nos. 430 and 739 so far as the Official Assignee is concerned with liberty to act for him and in his name subject to any further order of the Judge in Insolvency : provided further that no new proceedings whether by way of appeal or otherwise shall be instituted by the creditors in the name of the Official Assignee without the leave of the Judge in Insolvency. The creditors Provasankar & Co., must pay the costs of this motion to Laduram Nathmull but there will be no other order as to costs, save that after both suits have been finally settled or decided the creditors are to be at liberty to make application in Insolvency to recoup themselves for their own costs of this motion out of the insolvent's estate.

Secondly I have a motion (30th April 1919) by Karuri asking to have the award in Suit No. 430 set aside. I propose to make that order. There will be no order as to costs. I direct the award to be taken off the file but stay this portion of the order pending any appeal.

Thirdly in Suit No. 739 I have a motion by the Official Assignee and Karuri asking me to set aside the consent order of reference dated 17th March 1919. That motion was brought on 22nd May 1919 as a result of my previous judgment. I propose to make that order but without costs. I direct the award in this suit also to be taken off the file but stay this portion of the order pending any appeal.

On the other two motions to set aside the awards, one brought by the Official Assignee dated 30th April 1919 in suit No. 430 and the other by Karuri dated 25th April 1919 and intituled in both suits I make no order, as to costs or otherwise.

Against this order, the plaintiff appealed.

Messrs. B. L. Mittar & S. L. Banerjee for the Appellant.

Mr. N. N. Sircar for the 1st Respondent.

Mr. S. R. Das for the Respondent Official Assignee.

Sir B. C. Mitter for the Respondent Nilmony Das insolvent.

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December, 4.

The judgments of the Court were as follows:

Sanderson, C. J.:—This is an appeal from an order of my learned brother Mr. Justice Rankin by which it was ordered that the award of the arbitrator appointed in the suit, by reason of the order made in the suit and dated the 17th March, 1919, be set aside and taken off the file. The learned Judge came to his conclusion on the ground that the conditions of the jurisdiction which is given by clause (1) of the second schedule to the Civil Procedure Code had not been complied with.

The suit was brought by one Nandalal Karuri against the official Assignee of Calcutta, Nilmoney Das who was then an insolvent, and a firm called Laduram Nathmull. It appears that Nandalal Karuri was a mortgagor, Nilmoney was the mortgagee and Laduram Nathmull were sub-mortgagees from Nilmoney.

The prayers of the suit are set out at page 30 of the paper book in Appeal No. 66 of 1919 and were as follows: '(a) That the said premises Nos. 84 A, 84-1 A, 84-2 A and 84-3 A, Bowbazar Street in the town of Calcutta be declared redeemed and discharged from the mortgage or charge effected by virtue of the deposit of title deeds made on the 7th day of February, 1915: (b) That if necessary, all accounts be taken and enquiries made as to this Hon'ble Courts may seem fit or necessary and the usual redemption decree be passed in this behalf.

(c) That the defendants Laduram Nathmull, Nilmoney Das and the Official Assignee or whoever amongst them are or is found to be in custody of the title deeds and deposited as aforesaid on the 7th day of February, 1915, be directed to return the same to the plaintiff and do also make over the said memorandum of agreement, dated the said 7th day of February, 1915, duly cancelled."

A further prayer was that the "Defendants Laduram Nathmull and the Official Assignee or either of them do pay to the plaintiff his costs of this suit."

Now, the petition was by the plaintiff Nandalal Karuri and he prayed by that petition that all matters in difference in this suit including the question of costs be referred to the sole arbitration of Mr. A. N. Chaudhuri, Barrister-at-law. The petition alleged that the defendant Nilmoney Das being an insolvent had no interest in the suit inasmuch as all his interest in the aforesaid property vested in the Official Assignee by operation of law. The order followed the petition and provided that with the consent of all the parties as aforesaid, all matters in difference in this suit including the question of costs of the suit and of the reference be referred to the final

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decision of Mr. A. N. Chaudhuri, Bar-at-law.—"The parties aforesaid" were the Official Assignee, Laduram Nathmull and the plaintiff, and the consent of Nilmoney Das—one of the defendants,—was not obtained.

The learned Judge has held that in this case, inasmuch as the consent of Nilmoney Das had not been obtained and inasmuch as all the matters in difference in the suit including the question of costs were referred, the Court had no jurisdiction to make the order of reference. I cannot help feeling in this case that the upholding of this order may involve some hardship upon the appellant and that if proper steps had been taken at the time of the application for reference, either to strike out the name of Nilmoney Das as a defendant in the suit or to modify the terms of the application, the result which has now been obtained might have been different. But this is a matter of importance, as it relates to a question of jurisdiction, and inasmuch as our decision in this case may affect other cases in the future, it is impossible to allow any consideration of hardship to influence our decision. I agree with what the learned Judge has said upon that point. It is this: "The question is one of jurisdiction and the conditions of jurisdiction. If these are not satisfied I cannot refuse to notice the defect nor will I accept something less as sufficient. These conditions are simple and clear and should be kept so. Technicality will in the end be less troublesome if they are exacted firmly and in all cases, than if they are tempered or modified in the hope of avoiding technicality. Rule 1 of the 2nd Schedule is to be obeyed, not merely to be placated." I think it is obvious from the terms of this clause that it was contemplated that in certain cases all matters in difference in the suit might not be referred; and that when only some matters in difference in the suit were referred the consent of the parties who were interested in those matters would be sufficient. That however is not this case, because, as I have already pointed out, the order of reference was that all matters in difference in this suit including the question of costs should be referred. Having regard to the allegations in the plaint, the relief asked for therein and the form of the order of reference to which I have just referred, in my judgment it is impossible to say that Nilmoney Das was not a party interested in the matters which were referred: even though he did not appear, the Court had no jurisdiction to make the order of reference without his consent. Consequently, inasmuch as the Court had no jurisdiction to make the order of reference the whole proceedings were invalid from the beginning, and the award itself was invalid: and, therefore, the order

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of the learned Judge was right and the appeal therefrom should be dismissed with costs.

Mookerjee, J.—I agree that this appeal must be dismissed.

I desire to add that when the Court is called upon to decide a matter of jurisdiction, no question of hardship, no consideration of technicality can be permitted to affect our judgment. The foundation of jurisdiction here is the agreement amongst all the parties interested that the matters in difference between them shall be referred to arbitration. If all the parties interested do not apply and yet an order of reference is made, the order is illegal because made without jurisdiction. If an award follows on the basis of that reference, it is equally illegal, because it is founded upon a reference made without jurisdiction. In my opinion, the rules relating to jurisdiction should be strictly construed and the Court should be astute not to permit litigants to circumvent such provisions of the code, for otherwise parties will be encouraged to evade these statutory directions. On the facts stated by learned counsel, it is plain that we cannot hold that the insolvent had no interest within the meaning of the first paragraph of the second schedule of the Code of Civil Procedure; indeed, he frankly admitted that his consent to the reference could not be obtained because he had disappeared in view of the bankruptcy proceedings.

Fletcher, J.—I agree.

Appeal No. 66.

The judgment of the Court was delivered by

December, 4.

Sanderson, C. J.—This appeal being called on, it is agreed that the judgment in the last appeal (No. 65 of 1919) covers this appeal. The result is that in our judgment this appeal should be dismissed with costs.

Messrs. Pugh & Co.:—Attorneys for the Appellant.

Messrs. B. N. Basu & Co.:—Attorneys for the Respondents in Appeals Nos. 65, 66 and 68.

Mr. M. N. Sen:—Attorney for the Respondent in Appeal No. 67.

A. T. M. *Appeals dismissed.*

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge, and Sir Earnest Edward Fletcher, Knight, Judge.

CIVIL. 1919.

G. M. BIRLA & CO.

v.

JOHURMULL PREMSUKH.*

November, 28. December, 2.

Interlocutory order—Proceedings, stay of—Arbitration—Impeaching contract—Misrepresentation to avoid contract.

An arbitration proceeding is to be stayed when a plaintiff impeaches a contract on equitable grounds: *Gajanand* v. *Shaik Taleb* (1) followed.

A misrepresentation should in fact materially induce the contract in order to give a right of avoidance.

Appeal by the Defendants.

Suit for a declaration that a certain contract was void and unenforceable against the plaintiffs and for an injunction restraining the defendant firm from proceeding with the arbitration proceedings before the Bengal Chamber of Commerce mentioned in the plaint. Mr. Justice Chaudhuri granted an interlocutory injunction restraining the arbitration proceedings in the case by the following order:

June, 4.

Chaudhuri, J.: The plaintiff firm has instituted this suit for a declaration that the contract, dated the 6th July, 1918 is void and unenforceable against them and for an injunction restraining the defendant firm from proceeding with the arbitration proceedings before the Bengal Chamber of Commerce mentioned in the plaint. They allege that after the contract was entered into they called upon the defendant firm to declare the name of the mill in terms of the contract but the defendant firm failed to declare the name and requested the plaintiffs to send the goods in their name. The plaintiffs thereupon treated the contract as void inasmuch as the defendant firm had no principals and as they had failed to disclose the name of the mill. The defendant firm's answer is that there is a well known and recognised usage in the jute and hessian trades in Calcutta that the following incidents were and are annexed to the contract in suit:—"That the persons signing as brokers in the case of contracts purporting to be for their principals are themselves entitled to enforce such contracts and are liable personally on such contracts in all cases *i.e.*, in cases where they have been undisclosed principals as also in cases where in fact they have no principals and act for

* Appeal from Original Order No. 57 of 1919, against the order of Mr. Justice Chaudhuri, dated the 13th June, 1919.

(1) (1917) 22 C. W. N. 538.

themselves and on their own account. They may sign such contracts as aforesaid when negotiations between them and some mill or mills or other party are in progress, and, on the closing of such negotiations within a reasonable time declare the name of their principals accordingly, and when such negotiations are not so closed, the persons signing as aforesaid are entitled to enforce such contracts and remain solely personally liable on such contracts." They allege that the contract was entered into on the defendant firm's risk and responsibility and that they were to be treated and as a matter of fact were treated as principals in the transaction and they deny that they represented themselves to have acted as brokers. They do not admit that they were bound to declare the name of the mill and that they were entitled to ask for the goods in their own name. They refer to certain correspondence and allege that the plaintiff firm antedated its letter of cancellation. It was held in *Ramji Das* v. *Jankí Das* (1), that where a person in entering into a contract purported to act as agent for an undisclosed principal but in fact no such principal existed and the person was in reality acting on his own account he is debarred from suing on the contract by section 236 of the Contract Act.

It was held in *Joy Lall* v. *Monmotha Nath Mullick* (2), that in a suit of this character evidence of the alleged custom is admissible. That case related to an application to set aside an award of the Bengal Chamber of Commerce and it was held that the Chamber had jurisdiction to go into the question and the award was not therefore bad. It seems to me that the questions involved in this suit are of a complicated character and involve issues as regards custom and misrepresentations made and also the truth and otherwise of certain important letters between the parties being sent on proper dates. It involves questions of fraud and forgery and I think under the circumstances it is a fit case for trial by this Court and not by the Chamber. It was held in *Gajanand Maskara* v. *Shaik Taleb Jalaluddin* (3), that in a case where the plaintiff was impeaching the contract on the ground of fraud it was quite right to stay the arbitration proceedings. Another ground has been taken whether such a suit is at all maintainable having regard to section 42 of the Specific Relief Act which corresponds to English order XXV—5. This is a question which ought to be properly determined as a preliminary issue in the suit. The Rule is made absolute; costs of this application will be costs in the cause.

(1) (1912) I. L. R. 39 Calc. 802. (2) (1916) 20 C. W. N. 365.
(3) (1917) 22 C. W. N. 535.

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G. M. Birla & Co.
v.
Johurmull.

Against this order, the defendants appealed.

Sir B. C. Mitter with *Mr. K. P. Khaitan* for the Appellants.

Mr. N. N. Sircar for the Respondents.

The judgments of the Court were as follows :

December, 2.

Sanderson, C. J. :—The learned Judge has granted an interlocutory injunction restraining the arbitration proceedings in this case.

The learned Judge relied upon several grounds in his judgment, but the learned counsel appearing in this Court for the plaintiff respondent has said that he can support one of those grounds only, which was as follows : (page 30, line 25). "It was held in *Gajanand Maskara* v. *Shaik Taleb Jalaluddin* (1) that in a case where the plaintiff was impeaching the contract on the ground of fraud it was quite right to stay the arbitration proceedings." That is the only ground on which the learned counsel has endeavoured to support the learned Judge's judgment—he has not argued the points which were urged in the other case and to which I drew attention in my previous judgment.

The question is whether the plaintiffs in this suit can be said to be impeaching the contract upon an equitable ground such as that the plaintiffs were induced to enter into the contract by fraudulent misrepresentation. A statement of the alleged misrepresentation is found in the letter of Messrs. Fox and Mandal at page 19 where it is said : "The contract was on the face of it with a mill whose name was not disclosed and if your clients chose to pass a so-called contract without having secured a mill as their principal they were guilty of misrepresentation, as soon as this became obvious to our clients, viz., when your clients asked for delivery to themselves our clients were perfectly justified in repudiation of the so-called contract." When I turn to the plaint which was filed in this case, I find that it is in paragraph 4 that the ground, upon which reliance is now placed is dealt with. There I find this : "inasmuch as the defendant firm had failed to disclose the name of their principals and inasmuch as the defendant firm had in fact no principal the plaintiff firm treated the said contract as void and inoperative." To my mind, if the plaintiffs desired to impeach this contract on the ground that the defendants had made a fraudulent misrepresentation which induced them to enter into the contract, then they ought to have so pleaded. There is no such allegation in the plaint : It is clear that the misrepresentation must have in fact

(1) (1917) 22 C. W. N. 535.

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materially induced the contract in order to give the right of avoidance. There is no allegation in this plaint that the plaintiffs were deceived or that the alleged misrepresentation induced the plaintiffs to enter into the contract. I think this is one answer to the argument which was put forward by the learned counsel for the plaintiffs.

I think there is a further answer:—The defendants alleged that in the trade in question there is a well-known and universal custom. The custom alleged is set out in the learned Judge's judgment at page 29 of the paper book—I do not propose to read it all, but part of it runs as follows: "They (i. e. the persons signing as brokers) "may sign such contracts as aforesaid when negotiations between them and some mill or mills or other party are in progress, and, on the closing of such negotiations within a reasonable time declare the name of their principals accordingly, and when such negotiations are not so closed, the persons signing as aforesaid are entitled to enforce such contracts and remain solely personally liable on such contracts."

The defendants argued that the alleged custom is tacitly incorporated into the contract and must be taken as a part, though an unexpressed part, of the agreement between the parties: and, that if the alleged custom is taken as part of the contract between the parties, that custom in itself destroys the allegation of fraudulent misrepresentation which the plaintiffs have urged in their argument in this Court, but which, as I have said before, was not properly pleaded in their pleading. For these reasons, having regard to the form of the pleading in this case, and having regard to the alleged custom which is relied upon by the defendants which they say must be incorporated into the written contract, I am of opinion that this is not a suit in which the plaintiffs can be said to be impeaching the contract upon equitable grounds: For these reasons the appeal should be allowed and the questions at issue between the parties should be referred to the tribunal which the parties themselves have chosen. Consequently, the interlocutory injunction which has been granted by Mr. Justice Chaudhuri should be set aside and that the respondents must pay the costs in this Court and in the Court below.

Mookerjee, J.—I agree.

Fletcher, J.—I agree.

Messrs. Khaitan & Co.: Attorneys for the Appellants.

Messrs. Fox & Mandal: Attorneys for the Respondents.

A. T. M. *Appeal allowed.*

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge, and Sir Earnest Edward Fletcher, Knight, Judge.

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1919.

December, 2.

TOREMULL DILSOOK ROY

v.

KUNJ LALL MANOHAR DASS.*

Appeal—Judgment—Order refusing to issue commission to examine witnesses—Letters Patent, cl. (15).

No appeal lies from an order refusing to issue commission for the examination of witnesses, as the order is not a judgment within the meaning of clause (15) of the Letters Patent.

Appeal by the Defendants.

Suit for recovery of certain sum of money.

An application was made for the issue of commission to examine witnesses, which was refused by the following order of

July, 7.

Greaves, J. : Upon reading on the part of the defendant firm a Master's summons bearing date the 26th day of June last and an affidavit of Kherode Chandra Chowdhury of the due service thereof affirmed on the 27th day of June last and an affidavit of Babu Lal affirmed on the 26th day of June last and an affidavit of the said Babu Lall affirmed on the 3rd day of July instant all filed this day and upon reading on the part of the plaintiff firm an affidavit of Madan Lall Jalan affirmed on the 2nd day of July instant filed this day and upon hearing Mr. A. K. Roy advocate for the defendant firm and Mr. S. N. Banerjee advocate for the plaintiff firm, it is ordered that the application of the defendant firm pursuant to the said Master's summons be and the same is hereby dismissed. And it is further ordered that the defendant firm do pay to the plaintiff firm their costs of and incidental to this application including the fees to counsel to be taxed by the Taxing Officer of this Court.

Against this order, the defendants appealed.

Mr. A. K. Roy for the Appellants.

Messrs. S. N. Banerjee and *R. N. Mitter* for the Respondents.

The judgment of the Court was delivered by

December, 2.

Sanderson, C. J.:—This is an appeal from an interlocutory order made by my learned brother Mr. Justice Greaves. An application was made on behalf of the defendants that a commission should

* Appeal from Original Order No. 62 of 1919, against the decision of Mr. Justice Greaves, dated the 7th July, 1919.

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1919.
Toromull Dhsook
v.
Kunj Lall.
Sanderson, C. J.

issue for the examination of two gentlemen whose evidence the defendants desired to place before the Court. The learned Judge refused the application. In our judgment, there is no appeal from this order: it is not a "judgment" within the meaning of clause 15 of the Letters Patent. I think it is right to add that we would have dismissed the appeal on the merits, because the applicant has not put materials before the Court sufficient to satisfy us that the presence at the trial of these gentlemen cannot be obtained by the defendants.

The result is that this appeal is dismissed with costs.

Mr. S M. Dutt: Attorney for the Appellants.

Mr. J. K. Sarkar: Attorney for the Respondents.

A. T. M. *Appeal dismissed.*

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge, and Sir Earnest Edward Fletcher, Knight, Judge.

MOHAN LAL SHAH AND ANOTHER

v.

JAHURY LAL SHAH.*

CIVIL.
1919.
December, 11.

Res judicata—*Civil Procedure Code (Act V of 1908), Sec. 11—Claiming under different title—Claim raised but not decided.*

The present suit was instituted against J, asking for a declaration that the properties mentioned in the plaint were acquired by D and that he died possessed thereof, and that the plaintiffs as his heirs were entitled to possession of such properties. Previously a suit No. 217 of 1912 were brought by the present plaintiffs against their father D, and the present defendant, asking for a declaration that D held the identical properties, which were claimed in the present suit, as trustee for them. D died shortly after the institution of suit No. 217. That suit was amended on the plaintiffs' application by recording the death of D and a new summons was issued to J, the remaining sole defendant in suit No. 217. No amendment having then been made or applied for in order to raise the claim put forward in the present suit, all matters in the suit were referred to arbitration. Late in the arbitration the present plaintiffs applied to the arbitrators to decide the claim which was made in the present suit. The arbitrators decided that they had no jurisdiction to do so as the only matter referred to them had been the question of trust. Thereafter the plaintiffs in suit No. 217 applied to the Court

* Appeal from Original Civil No. 46 of 1918, against the decision of Mr. Justice Greaves, dated the 2nd May, 1918.

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Mohan Lal v. Jahury.

asking that they might be at liberty to amend by raising in that suit the claim that was made in the present suit. The application was refused:

Held, that the suit was not barred by *res judicata*, as the plaintiffs were suing under a different title to that under which they were endeavouring to support their claim in the first suit, as also that the plaintiffs' attempt to raise that point was refused by the former Court.

Appeal by the Plaintiffs.

Suit for recovery of certain property.

The material facts appear from above.

The suit was dismissed by the following judgment of

May, 2.

Greaves, J.:—This is a suit commenced by Mohan Lal Shaha and Mati Lal Shaha against one Jahury Lal Shaha, and the plaintiffs ask for a declaration that the properties set forth in para. 11 of the plaint were acquired by Dilchand Shaha, and that he died possessed thereof, and that the plaintiffs as his heirs are entitled to possession of such properties; the plaintiffs also ask for consequential relief namely discovery and an account.

A preliminary objection is taken on the part of the defendant that by virtue of the provision of section 11 of the Code of Civil Procedure this suit is barred. Section 11 provides as follows:—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court."

And explanation 4 of the section is as follows:—

"Any matter which might and ought to have been made the ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

The defendant here contends that the matters raised here might have been decided in another suit No. 217 of 1912, which was a suit brought by the present plaintiffs against their father Dilchand, and the present defendant asked for a declaration that Dilchand held the identical properties, which are claimed in this suit, as trustee for them.

Dilchand had two wives Kulia and another. The present plaintiffs are the sons of Kulia and the second wife had a son Chaitan Lall who died unmarried in 1886, and with whom we are not concerned. The contention of the plaintiffs in suit No. 217 of 1912

was that their maternal grandfather Misri Lal created a trust of certain properties in their favour. It appears from the schedules A and B to suit No. 217 of 1912 that what was then claimed as being trust property held by Dilchand on behalf of the plaintiffs was a certain house, No. 2H8 Bazar Road Hastings, valued at about Rs. 2,000 and certain stock-in-trade including gold and silver articles and ornaments valued at about Rs. 7,000. Schedule A to the plaint in that suit has a heading weight of the gold articles and the material weight of it for the purpose of this application are the first five articles under that heading. In the plaint in this suit, in paragraph 11 it will be found that the claim is made in respect of premises No. 2H8 Bazar Road Hastings, valued at about Rs. 2,000, and a stock-in-trade gold articles and ornaments valued at Rs. 7,000, and the articles (c) (d) (e) (f) and (g) are identical with the gold articles above referred to set forth in schedules A of suit No. 217 of 1912. Consequently it is clear that so far as the subject matter of the two suits is concerned, they are identical.

Now, when suit No. 217 of 1912 was commenced, Dilchand was alive and there is no doubt that as long as he was alive the plaintiffs in that suit and in the present suit could not raise as an alternative claim that they were entitled to the properties claimed in suit No. 217 of 1912 and in this suit as heirs of Dilchand. That suit was commenced on the 5th March 1912 and Dilchand died five days later, namely, on the 10th March 1912. On the 10th April 1912 the suit was amended on the plaintiffs' application by recording the death of Dilchand and a new summons was issued to Jahury Lal Shaha, the remaining sole defendant in suit No. 217 of 1912; and there is no doubt that at that time the claim which is raised in the present suit could have been raised in that suit. On the 24th November 1913 no amendment having then been made or applied for in order to raise the claim put forward in the present all matters in that suit, were referred to arbitration. Late in the arbitration the present plaintiffs applied to the arbitrators to decide the claim which is now made in this suit. The arbitrators quite rightly decided that they had no jurisdiction to do so as the only matter referred to them had been the question of the trust specifically raised in suit No. 217 of 1912. Thereafter in the month of February 1915 the plaintiffs in suit No. 217 of 1912 applied to the Court asking that they might be at liberty to amend by raising in that suit the claim that is now made in the present suit. That application was refused and I do not think it is an unreasonable inference to draw that the application was only made in view of the fact that the plaintiffs apprehended an

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unfavourable decision of the arbitrators with regard to their claim that a trust had been created in their favour by Misri Lal of which Dilchand was their trustee; and I think the inference is also justified by the statements that are contained in paras. 7 and 8 of the plaint in the present suit. This being so, I have got to decide whether the case falls within section 11, explanation 4 of the Civil Procedure Code or not. I think it does. I think having regard to the words of explanation (4) that after Dilchand's death on the 5th March 1912 matters that are raised in this present suit might have been raised as an alternative claim in suit No. 217 of 1912 and when new summonses were issued on the 10th April the suit was to some extent a new suit in which certainly this question could have been raised.

This being so I must hold that the preliminary objection prevails, and accordingly the suit fails and must be dismissed. The plaintiffs are suing in *forma pauperis*, and therefore there will be no order for costs. There will be an order for taxation as between attorney and client on scale No. 2 against the defendant in favour of his attorney.

Against this decision, the plaintiffs appealed.

Mr. U. P. Roy for the Appellants.

Messrs. B. K. Lahiri and *N. M. Chatterjee* for the Respondent.

The judgments of the Court were as follows:

December, 11.

Sanderson, C. J.:—This is an appeal from the judgment of my learned brother Mr. Justice Greaves. The suit was by the plaintiffs claiming, as heirs of their deceased father, certain properties which were mentioned in the plaint.

The learned Judge has disposed of the case upon a preliminary point, namely that the suit would not lie by reason of the provisions of section 11 of the Civil Procedure Code and by reason of a previous suit which was instituted in 1912. It appears that when the suit of 1912 was instituted the father of the plaintiffs was still alive. It is, therefore, obvious that when the suit was instituted the plaintiffs could not claim as his heirs. But the father who was one of the defendants died shortly after the suit was instituted and an amendment was made record ing the death of the father (Dilchand) and a new summons was issued to the remaining sole defendant. Then all matters in dispute in that suit were referred to arbitration: and, after the reference the plaintiffs desired to raise the point which they are raising in this suit, and they applied to the Court that they might

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have an opportunity of amending the plaint by raising in that suit the claim which is now being raised in the present suit. That application was refused, and the Court has now held that although the plaintiffs applied in the first suit to raise the point which they are now raising, and although that application was refused, their present suit must be held to be untenable, because the question is *res judicata*. In my judgment the learned Judge's decision can not be supported, *first* because in this suit the plaintiffs are suing under a different title to that under which they were endeavouring to support their claim in the first suit: and, *secondly*, because the plaintiffs did attempt to raise this point in the first suit but were not allowed by the Court to do so.

For these reasons the judgment must be set aside and the suit must be remanded to the learned Judge on the original side for trial. The appellants are entitled to the costs of this appeal and also to the costs in the Court of first instance.

Mookerjee, J.—I agree.

Fletcher, J.—I agree.

Bonnerjee and *Bonnerjee*: Attorneys for the Appellants.

M. M. Chatterjee: Attorney for the Respondent.

A. T. M. *Appeal allowed.*

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge, and Sir Ernest Edward Fletcher, Knight, Judge.

JOYLAL & CO.

v.

GOPIRAM BHOTICA.*

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November, 26, 27, 28. December, 2.

Injunction—Award, invalidity of—Practice, difference in—Discretion.

It is a matter of procedure and not of substance that the party complaining of the invalidity of award would have to apply to the Court to have the document taken off the file. An interlocutory injunction should not be granted upon novel considerations interfering with arbitrators by reason of difference in practice between the Arbitration Act and the provisions of the English rules: *Sardarmull v. Agar Chand* (1) followed.

* Appeal from Original Order No. 56 of 1919, against an order of Mr. Justice Chandhuri, dated the 4th June 1919.

(1) (1919) 23 C. W. N. 811 (814).

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Assuming that the High Court has jurisdiction, it is entirely in its discretion to grant or refuse an injunction restraining a party from proceeding with arbitration.

Appeal by the Defendants.

The defendants, on the 18th of November, 1918, wrote to the Registrar, Tribunal of Arbitration, The Bengal Chamber of Commerce, submitting their statement and requesting the constitution of a tribunal of arbitration upon the matters in dispute between the defendants and the plaintiff. On the 18th December, the plaintiff filed his suit praying *inter alia* for an injunction restraining the defendant firm from proceeding with the said arbitration pending before the tribunal of the Bengal Chamber of Commerce. On the same day an application was made by the plaintiff for an interlocutory injunction to restrain the defendants from proceeding with the arbitration. A Rule was issued on that day, which was made absolute by the following order of

June, 4.

Chaudhuri, J.:—In this case the plaintiffs allege that the defendant firm acted as brokers in passing the contract in suit and that they had sold on their behalf as brokers to Amarchand Madhoji & Co. their principals, and that the defendant firm disclosed the name of their principals to the plaintiffs; that thereafter the plaintiffs ascertained by enquiries from Amarchand Madhoji & Co. that the defendant firm had without the knowledge and consent of the plaintiffs settled the contract with Amarchand Madhoji & Co. by paying them a difference of Rs. 750 only. It is further alleged that the defendant firm had upon an untrue allegation that they were themselves the principals under the said contract and by suppressing the fact that they had disclosed the name of Amarchand Madhoji & Co. and who were in fact their principals and also suppressing the fact of the said settlement had submitted a case for arbitration to the Bengal Chamber of Commerce on their own account claiming a sum of Rs. 42,250 as damages for breach of the said contract. The plaintiffs contend that the defendant firm had merely acted as brokers in the transaction and that they are not entitled to make any such claim. The defendant firm alleges that they had at first passed the bought note in respect of the said contract to Amarchand Madhoji & Co., but the latter refused to have anything to do with the plaintiff firm and that thereafter they settled with them; that in fact the name of Amarchand Madhoji had never been disclosed to the plaintiff firm. They also rely upon an allegation that there is a well-known custom in Calcutta by which brokers are held responsible by both buyers and sellers for the performance of such contracts

and that the brokers themselves either receive the damages or pay the same.

In this application great reliance is placed upon amongst others *Fleet* v. *Murton* (1), in which it was held that such evidence of custom in the trade is admissible. *The Produce Brokers Co.* v. *Olympia Oil & Cake Co.* (2), was also referred to, which overruled *Hutchison & Co.* v. *Eaton & Son* (3), and *The North Western Rubber Co*, v. *Huttenbach & Co.* (4). It was held in that case that under a clause in a contract referring to arbitration arising under the contract, it is competent to the arbitrator finally to determine the existence of a custom affecting the rights and obligations of the parties under that contract where such custom is not inconsistent with the terms of the contract. I think however having regard to the character of the suit and the allegations of fraud and misrepresentation made as also as it involves difficult questions of law and custom it is a fit case for this Court and incompetent for the Chamber and the arbitration should be stayed. In this connection I may refer to my judgment in *Jokurmull Premsook* v. *Birla & Co.* (5), disposed of to-day. Another ground has been taken whether such a suit is at all maintainable having regard to section 42 of the Specific Relief Act, which corresponds to English Order XXV—5. This is a question which ought to be properly determined as a preliminary issue in the suit.

The Rule is made absolute. Costs of this application costs in the cause.

Against this order, the defendants appealed.

Messrs. S. R. Das and *P. N. Chatterjee* for the Appellants.

Messrs. N. Sarkar and *S. M. Bose* for the Respondent.

The judgments of the Court were as follows:

December, 2.

Sanderson, C. J.—This is an appeal from the judgment of my learned brother Mr. Justice Chaudhuri by which he made absolute a Rule calling upon the defendants, Joylal & Co., to show cause why an injunction should not be granted restraining them, until the final disposal of the suit or further order of the Court, from further proceeding with the arbitration proceedings in respect of contract No. 13,700, dated the 6th day of December 1917. It appears that on the above-mentioned date the defendants had entered into a contract with the plaintiff. It was in the form of a sold note and

(1) (1871) L. R. 7 Q. B. 126. (2) (1916) I. A. C. 314.
(3) (1884) 13 Q. B. D. 861. (4) (1908) 2 K. B. 907.
(5) (1919) 31 C. L. J. 158.

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was addressed to the plaintiff Gopiram Bhotica and was as follows : "We have this day sold by your order and on your account to our principals 1,50,000 yards Hessian cloths" of a description and quality therein stated. It was signed by the defendants as "Brokers." Delivery was to be January to March 1918, 50,000 yards monthly. The contract contained a clause 12, which ran as follows :

"Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce applicable for the time being for decision, and such decision shall be accepted as final and binding on both parties to the contract." In January 1918, the plaintiff asked for a delivery order for 50,000 yards. This request was not complied with, and on the 31st of January 1918, Messrs. Khaitan & Co. on behalf of the defendants tendered Rs. 8750 as the value of the goods deliverable under the said contract. The goods not having been delivered, on the 12th of February 1918, the defendants sent a difference bill for Rs. 13,625 and demanded payment of that sum. On the 20th of February 1918, the plaintiff wrote the following letter :

"I am surprised to receive your letter of the 12th instant delivered me late by post, enclosing your difference bill No 15,571, dated 5th current for Rs. 13,625 and in reply beg to point out to you that due date price charged therein is not correct. Please amend the due dates price as settled with you on the due date at Rs. 37 per 100 yards, and send me back at your earliest convenience for payment and oblige." "Your bill is returned herewith." On the 25th of February 1918, the defendants asked the plaintiff for delivery order for further 50,000 yards cloth. After several letters the plaintiff wrote the letter dated the 6th of March 1918. It is as follows :

"I am in receipt of your letter of and instant, delivered me late by the post office, and in reply I challenge your right of purchasing the goods against me after due date. I regret I cannot entertain your claim." A difference bill was sent and the plaintiff replied on the 16th of March, 1918, as follows : "I have no other alternative but to refer you to my letter of 6th current. I deny my liability into the matter." A similar demand for delivery order was made in respect of the March consignment, and upon a difference bill being submitted by the defendants the plaintiff on the 11th of April 1918, denied his liability. On the 18th of November, 1918, the defendants wrote to the Registrar, Tribunal of Arbitration, The Bengal Chamber of Commerce, submitting their statement and requesting the constitution of a tribunal of arbitration upon the

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matters in dispute between the defendants and the plaintiff. On the 18th of December 1918, the plaint in the suit was filed: in it the plaintiff asked "(a) For a declaration that the defendant firm is not entitled to proceed with the said arbitration or claim any damages under the said contract in which he acted merely as broker.

(b) for an injunction to restrain the defendant firm from proceeding with the said arbitration pending before the tribunal of the Bengal Chamber of Commerce." On the same day an application was made by the plaintiff for an interlocutory injunction to restrain the defendants from proceeding with the arbitration. The learned Judge on that day granted a Rule, which, as already stated, was made absolute on the 4th of June 1919.

The learned Judge's decision was based upon certain grounds which were as follows: "I think, however having regard to the character of the suit and the allegations of fraud and mis-representation made and also as it involves difficult questions of law and custom it is a fit case for this Court and incompetent for the Chamber, and the arbitration should be stayed."

On the hearing of this appeal, the learned counsel for the plaintiff said that he did not support the grounds of the judgment, but he relied upon certain points upon which he argued he could support the judgment. The first was that the arbitration clause was confined to disputes arising between "parties to the contract," which he contended, means the buyer and seller, and that the defendants who signed the contract merely as brokers were not parties to the contract of purchase and sale within the meaning of the clause.

On the other hand, it was contended on behalf of the defendants that there is in Calcutta a well-known custom by which brokers in contracts in gunny, hessian and other manufactured jute goods, are held responsible by both buyers and sellers for the performance of the said contracts and that the brokers themselves either receive the damages or pay the same.

The learned counsel for the plaintiff did not dispute the alleged custom, but he contended that the brokers did not by reason thereof become parties to the contract for all purposes or to such an extent that they could be said to be parties to the contract within the meaning of the arbitration clause. It was argued on behalf of the plaintiff that the question whether the defendants were parties to the contract should be decided by the Court: On the other hand, the defendants contended that this was a question which depended upon the express terms of the contract and the terms which would have to

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be read into it by reason of the custom and that it was a question which should be left to the Arbitration Tribunal for decision.

There was a dispute on a question of fact between the parties as to whether the defendants at the time of presenting the sold note to the plaintiff disclosed the name of their principals Messrs. Amarchand Madhoji & Co. Upon that question I am not in a position to express any opinion at present: it is a question which will have to be decided by the tribunal which adjudicate upon the dispute. It was further contended on behalf of the plaintiff that if the result of incorporating the alleged custom into the terms of the contract was to make the brokers "a party to the contract" within the meaning of the arbitration clause it was unreasonable. Another contention on behalf of the plaintiff was that by reason of the institution of the suit, the arbitrators appointed or to be appointed by the Chamber of Commerce were or would be *functus officio* and that the arbitration proceedings would be futile; and lastly it was argued on behalf of the plaintiff that the Court should exercise its discretion and dismiss the appeal on the ground that the injunction would be the means of avoiding a multiplicity of proceedings.

The defendants contended that the alleged custom was not unreasonable, and that in any event it was for the Tribunal of Arbitration to ascertain the custom and to decide what incidents are thereby imported into the contract. It was further urged on behalf of the defendants that this Court has no jurisdiction to restrain the arbitration proceedings by injunction, as such proceedings do not constitute an interference with any legal right of the plaintiff: that the alleged grounds, namely that the defendants were not a "party to the contract" and that the arbitration proceedings consequently would be futile were not sufficient to give the Court jurisdiction, and that even if the Court had jurisdiction to grant an injunction, there was no ground in this case for the exercise of such jurisdiction. It was then urged on behalf of the plaintiff that the arbitration proceedings might not be futile because in this country the award, if made against the plaintiff, could be executed as soon as it was filed and before the plaintiff could move the Court to restrain execution, and that this distinguished the case from the English cases based on the English Arbitration Act. I think the judgment of Mr. Justice Rankin in *Sardarmull* v. *Agar Chand* (1), supplies the answer on this point. The learned Judge says, "I think it is a matter of procedure and not of substance that the party complaining in such a case would have to apply to the Court to have the document taken off the file.

(1) (1919) 23 C. W. N. 811 (814).

"I do not think that I ought to start granting interlocutory injunctions upon novel considera tions, and attempt to commence a new system as regards interfering with arbitrators in such matters by reason of this difference in practice between the Indian Arbitration Act and the provisions of the English rules."

I do not think that it is necessary in this case for us to decide the question whether the Court has jurisdiction to grant an injunction : for, in my judgment, assuming that the Court has jurisdiction, we ought not now to exercise that jurisdiction. The judgment of the learned Judge having been based on grounds, which the learned counsel for the plaintiff did not support, it is entirely in the discretion of this Court to grant or refuse an injunction : and, in the circumstances of this case in my judgment an interlocutory injunction should not be granted. The suit in this case was obviously instituted for the purpose of preventing the arbitration proceedings : it is not a suit in which all the questions which are in dispute between the plaintiff and the defendants could be decided, *e.g.*, the amount, if any which is due to the defendants in respect of the contract could not be ascertained in the suit : and, I am not able at the present stage of the proceedings to say that the matters in dispute between the parties are such as should not be submitted to and decided by the Arbitration Tribunal.

For these reasons in my judgment the appeal should be allowed and the interlocutory injunction should be set aside with costs both in this Court and in the Court below.

Mookerjee, J.—I agree.

Fletcher, J.—I agree.

Messrs. Mitter and *Baral* : Attorneys for the Appellant.

Mr. N. C. Bose : Attorney for the Respondent.

A. T. M. *Appeal allowed.*

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.

CIVIL. 1919. June, 2, 4, 5.

BARANASHI MAZUMDAR AND OTHERS

v.

SUDARSAN DAS MAHANTA AND ANOTHER.*

Shebait—Right of appointment—Private endowment—Founder making no provision for the devolution of office of shebait—No time for growth of usage or custom.

Where a private endowment is of quite recent date affording no time for the growth of a usage or a custom and the founder has made no express provision for the devolution of the office of a shebait, the right of appointment to the office of shebait is vested in the founder or his representative: *Sital Das* v. *Protab* (1) and *Kunjamani* v. *Nikunja* (2) referred to.

Appeal by the Defendants.

Suit for declaration and for recovery of property.

The material facts appear from the judgment.

Babu Shibaprasanna Bhattacharyya for the Appellants.

Babu Amulya Kumar Bhattacharjee (with him *Babu Jogendra Narain Majumdar*) for the Respondents.

The judgment of the Court was delivered by

June, 5.

Mookerjee, J.—This is an appeal by the representatives of the third defendant in a suit instituted by the plaintiff for establishment of his right as shebait to five shrines and for recovery of dedicated properties appurtenant thereto. There is also a claim for the recovery of the personal properties of the deceased mohunt. There were three defendants in the suit. The first is a nominee of the late mohunt; the other two are the representatives of the founder of one of the shrines, namely, the shrine of Lakshmi Janardan Jew Thakur. In the Court below, the plaintiff entered into a compromise with the first defendant in respect of four of these shrines and a consent decree was made in his favour. There was, however, a contest between the plaintiff and the other defendants in respect of the fifth shrine and a decree has been made in favour of the plaintiff. On the present appeal, the controversy has been limited to the shebaitship of the properties of this shrine alone. There are really two points for consideration; namely, first, what is the nature

* Appeal from Original Decree No. 350 of 1915, against the decision of Babu Benod Behary Mitter, Subordinate Judge, 4th Court of 24-Purganas, dated the 23rd June, 1915.

(1) (1909) 11 C. L. J. 2. (2) (1915) 22 C. L. J. 404; 20 C. W. N. 314.

of the endowment created by Gopal Chandra Majumdar on the 20th January 1890 ; and secondly, what is the precise nature of the office of shebait in relation to that endowment? The answer to these questions depends upon the construction of the will of the founder.

The testator states in the first place that his ancestral deity was Lakshmi Janardan Salgram in his family dwelling house. He dedicates to the worship of the deity Lakshmi Janardan Salgram all his immovable properties. He then proceeds to appoint a shebait of the endowment so created. It is stated in the first place, that Sarajudas Mohunt Babaji has been performing the acts of worship of the deity and that the testator now appoints him to be the shebait in future of the said deity. He then proceeds to define the powers of the shebait. The shebait is to enjoy and hold possession of the properties, to manage and protect them, to make collections of profits and to pay them as also to pay revenue to the Collectorate. Upon these terms he is confirmed as shebait.

It is clear that the dedication of the properties is to the *deity* and not to the *shebait*. This is the plain meaning of the language used. But it is made clear beyond doubt by a sentence in the second paragraph of the will, where provision is made for the maintenance of a lady Umasundari Debi ; it is stated that the abovenamed Umasundari Debi is to be maintained from the "properties of the said deity" that is, out of the income of the properties dedicated to the deity. Consequently as regards the title to the properties there is no room for controversy. The title is vested in the ancestral family deity of the founder.

As regards the nature of the shebaitship, the Subordinate Judge, in several places in his judgment, has spoken of "Shebait-kaem." He has evidently misread the will. The original expression is সেবায়েতরূপে কায়েম রহিলেন which is accurately translated by the Court Translator by the phrase "he is confirmed as a shebait." This signified that before the will was executed, Sarajudas Mohant had been temporarily employed by the proprietor to perform the sheba ; and now that an endowment was created, he was permanently confirmed as the shebait. His position thus was that of a shebait who was to hold the properties and to manage them for the benefit of the worship of the idol.

The devolution of the office of shebait, next requires consideration. The appellant has argued that the founder has made no express provision for that purpose ; and that as the endowment is of

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a quite recent date, affording no time for the growth of a usage or a custom, the right of appointment to the office of shebait is according to the authorities vested in the founder or his representatives. This contention is supported by the decisions in *Sital Das Babaji* v. *Protap Chandra* (1); *Kunjamani Dasi* v. *Nikunja Behari Das* (2), which reviewed the earlier decisions on the subject. The same view is accepted as the well-settled rule by the Judicial Committee in the case of *Sitharamswamiar* v. *Meruswamiar* (3). We may observe parenthetically that there is apparently a misprint in the judgment where the word 'grantee' is used instead of the word "grantor." This is obvious from the earlier decision mentioned in the judgment in *Ramanathan Chetty* v. *Murugappa Chetty* (4), which was confirmed by the Judicial Committee in *Ramanathan Chetti* v. *Murugappa Chetti* (5).

It is not necessary for us to consider whether the second and the third defendants are the representatives of the founder. Although, on the evidence, we are not inclined to adopt the view taken by the Subordinate Judge, yet it is needless to decide this question for the reason that it is not the case of the plaintiff that he has been appointed shebait by the representatives of the original founder, whoever these persons may be. His contention is that he has succeeded his guru as chela and that he has been nominated a shebait in respect of the other shrines. That undoubtedly does not constitute him the shebait in respect of the shrine in suit. Even if we assume for a moment that the right of nomination to the office of shebait was vested in the first shebait, it is plain that the plaintiff has no title. If the right of nomination was vested in the first shebait, that right has been exercised in favour of the first defendant and not the plaintiff. This is clear from the will of Sarajudas Mohunt, which was executed by him on the 28th February, 1906. In the course of the argument addressed to us on behalf of the respondent, it was faintly contended that the right of nomination was invalidly exercised. It was suggested, first, that so long as there was a chela, the mohunt had no right to make an appointment to the office of shebait, and secondly, that even if the mohunt was at liberty to make the appointment, his choice was restricted to persons of his own sect. But there is no evidence in support of these

(1) (1909) 11 C. L. J. 2.
(2) (1915) 22 C. L. J. 404; 20 C. W. N. 314.
(3) (1917) I. L. R. 41 Mad. 296; L. R. 45 I. A. 1; 27 C. L. J. 231.
(4) (1903) I. L. R. 27 Mad. 192.
(5) (1906) I. L. R. 29 Mad. 283; L. R. 33 I. A. 139; 4 C. L. J. 189.

propositions. On the other hand, the statement of Sarajudas Mohunt, the guru of the plaintiff, completely negatives this assertion. Sarajudas Mohunt stated that he had succeeded, not as chela, but on the strength of the nomination made by the guru; and he also gave another instance where a similar succession had taken place, namely in the case of mohunt Ajodhya Das. In the next place his guru states that he made a nomination in favour of the first defendant in respect of the disputed shrine and its properties, because the idol was that of a householder and that with regard to an idol so established it was necessary that the shebait should be a householder. In the face of these assertions, it is impossible for us to attach any weight to the argument that the act of the mohunt was *ultra vires*. As we have said, however, it is not necessary for us to go into this part of the case, because, in our opinion, upon the construction of the will of the founder, it is plain that there was no dedication in favour of the plaintiff and that the first mohunt had no right to appoint his successors. Consequently, the right of appointment was vested in the founder's family. As the plaintiff does not claim to have been appointed shebait by the founder or his representatives, at the date of the institution of the suit, he had no enforceable title

The result is that this appeal is allowed, and the decree of the Subordinate Judge set aside in respect of the disputed shrine; in other words, the decree will stand, only in so far as it was made by consent between the plaintiff and the first defendant. The plaintiff will pay the costs of the defendants both here and in the Court below.

We desire to add one observation as regards the mode in which examination of witnesses on commission was conducted. One of the witnesses a man of 99 years of age—was harassed by questions in a manner which constituted an abuse of the privileges of the cross-examining pleader; and we hope that a repetition of this incident will never occur. We assess the hearing-fee in this Court at Rs. 200.

A. T. M. *Appeal allowed.*

Before Mr. Justice N. R. Chatterjea, and Mr. Justice Newbould.

CIVIL.

1916.

December, 13, 15, 18.

UPENDRA NATH GHOSE AND OTHERS

v.

DWARKA NATH BISWAS AND ANOTHER.*

Ejectment—Limitation—Rent, payment of—Rent, enhancement of—Presumption—Bengal Tenancy Act (VIII of 1885), Sec. 50(2)—Kabuliat.

Defendants Nos. 1 and 3, who purchasd the tenure in suit from defendant No. 4 paid rent for about 37 years and the rent was accepted from them :

Held, that the plaintiff could not get *khas* possession of the tenure as his right to do so was barred by limitation and hence could not ignore the right of defendants Nos. 1 and 3 who were entered in the record of rights as tenants.

The plaintiff produced a *kabuliat* of the year 1840 executed by the predecessor-in-interest of the defendant No. 4, the vendor of defendants Nos. 1 and 3. There was an express stipulation in the *kabuliat* that the tenants would pay enhanced rent according to the pargana rate :

Held, that the kabuliat might be considered either as a new contract under which the tenants agreed to pay enhanced rent, or as a contract containing receipts of the incidents of the tenancy which was in existence from before. The rent was therefore enhanceable.

Appeal by the Plaintiffs.

The material facts appear from the judgment.

Babu Amarendra Nath Bose for the Appellants.

Babu Priya Sankar Majumdar for the Respondents.

The judgment of the Court was as follows :

December, 18.

Defendants Nos. 1 and 3, who purchased the tenure in suit from defendant No. 4, appear to have paid rent for about 37 years and the rent was accepted from them. Plaintiff, therefore, is not entitled to obtain khas possession of the tenure as his right to do so is barred by limitation. That being so, the plaintiff cannot ignore the right of defendants Nos. 1 and 3 who were entered in the record of rights as tenants. We do not see, however, why the plaintiff should not get a decree for rent at the enhanced rate of Rupees 90 odd. It is true there is a presumption under section 50 (2) of the Bengal Tenancy Act arising from the payment of rent at the same rate for more than twenty years ; but the plaintiff has produced a Kabuliat of the year 1840 executed by the predecessor-in-interest of the defen-

* Appeal from Appellate Decree No. 414 of 1915, against the decree of S. P. Sen, Esq., Special Judge of Faridpur, dated the 15th December, 1914, reversing that of Babu Probhat Chandra Sen, Assistant Settlement officer of Faridpur, dated the 13th July, 1914.

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dant No. 4—the vendor of defendants Nos. 1 and 3. There is an express stipulation in the Kabuliat that the tenants would pay enhanced rent according to the Pargana rate. The Kabuliat may be considered either as a new contract under which the tenants agreed to pay enhanced rent, or as a contract containing recitals of the incidents of the tenancy which was in existence from before. In either view of the matter it shows that the rent was enhanceable. That being so, the enhancement allowed by the Court of first instance will stand; and to that extent only the decree of the Court of first instance is varied.

The result is that the decree of the lower appellate Court is set aside and the decree of the Court of first instance affirmed with respect to the amount of rent payable by the defendants. The entry of the names of defendants Nos. 1 and 3 in the record of rights will stand. Under the circumstances of the case, we direct that each party do bear its own costs in all the Courts.

A. T. M. *Appeal allowed.*

CIVIL REFERENCE.

Before Mr. Justice Newbould and Mr. Justice Panton.

KUMUD BEHARY PAL

v.

HARI CHARAN SARDAR.*

CIVIL.
1918.
November, 20.

Provincial Small Cause Courts, powers of—Attachment before judgment—Movables—Civil Procedure Code (Act V of 1908) Ss. 7 cl. (b), 94, order L.

A provincial Small Cause Court has the power to attach movables before judgment.

For the purpose of interpreting clause (b) of section 7 of the Code of Civil Procedure, an attachment before judgment is not one of the interlocutory orders there referred to.

The only orders excluded from the jurisdiction of Small Cause Courts are those specifically mentioned in section 94 as injunctions or interlocutory orders, that is to say, orders under clause (c) or clause (e) of section 94.

* Civil Reference No. 3 of 1918 by Babu Khetranath Banerjee, Munsiff, 2nd Court, Alipur, dated the 10th June, 1918.

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v.
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Reference under rule I, order XLVI of the Code of Civil Procedure.

The material facts appear from the following letter of reference :—

The plaintiff in the Small Cause Court suit noted in the margin seeks to attach before judgment money belonging to the defendant in the hand of a third person. I entertain grave doubts as to whether a Provincial Small Cause Court under the present Civil Procedure Code can attach before judgment, any property belonging to a defendant. The question is of great importance. I therefore think it fit to refer the point to the Hon'ble Court for an expression of its opinion. Sections 7, 94, 95 and order XXXVIII and L of the Code require our consideration in this connection. Section 7 lays down that sections 94 and 95 so far as they relate to injunctions and interlocutory orders shall not extend to Small Cause Court suits. Section 94 lays down that a Court in order to prevent the ends of justice from being defeated may, if it is so prescribed, issue warrant to arrest the defendant, call upon the defendant to furnish sufficient security or to produce any property before the Court *or order the attachment of property*, grant temporary injunction, appoint a receiver and make such *other* interlocutory orders as appear to the Court to be just and convenient. Section 95 simply invests the Court with powers to award damages in case of wrongful attachment, arrest or temporary injunction. Order XXXVIII deals in detail with arrest and attachment before judgment. Order XXXIX deals with injunctions and certain interlocutory orders. Under the heading "Interlocutory Orders" we find rules that empower Courts to sell articles attached before judgment which are subject to speedy and natural decay. Order L lays down the orders and rules that shall not extend to Small Cause Court suits. Orders XXXVIII and XXXIX are not in the list. Courts derive their authority to attach property before judgment under the last portion of clause (b), section 94 of the Code. If an attachment before judgment is an interlocutory order, then Provincial Small Cause Courts have no power to do this in virtue of clause (b), section 7 of the Code. An attachment before judgment cannot but be an interlocutory order. 'Something which is done between the commencement and the end of a suit or action which decides some point of matter which, however, is not a final decision of the matter in issue, is known as interlocutory order.' An interlocutory order determines questions that arise during the progress of an action. Orders for attachment before judgment are interlocutory orders according to the general acceptance of the expression. The Code does not define what orders are interlocutory orders and what

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are not. That an attachment before judgment is an interlocutory order within the meaning of the Code will appear from clause (e) of section 94. Clauses (a) to (d) of the section relate to interlocutory orders and clause (e) treats them as such by using the expression 'make such other interlocutory orders.' If all the clauses of section 94 and of section 95 relate to interlocutory orders then what is meant by the expression in sections 94 and 95 *so far as they relate to injunctions and interlocutory orders*. If the Code precludes Small Cause Courts from attaching property before judgment then how is it that order XXXVIII does not find a place in Order L? As orders XXXVIII and XXXIX are not within the exceptions mentioned in order L it is now being contended before us by the plaintiffs in Small Cause Court suits that not only has Small Cause Court power to attach movable property before judgment but it has also the power to attach immovable property. This interpretation cannot be accepted without ignoring section 7 of the Code. Orders XXXVIII, XXXIX and L are in the 1st schedule of the Code. The body of the Code governs and is not governed by the schedule. The plaintiff urges before me that by injunction and interlocutory orders in section 7 are meant only those things that are to be found mentioned in order XXXIX. His contention is principally based on the head lines of the order. It is difficult to hold that orders passed in connection with attachment before judgment are interolocutory orders but not the attachment itself. We cannot construe an Act by referring solely to its head lines and marginal notes if they be not consistent with its plain provisions. It is difficult to make out why order XXXIX is described as temporary injunctions and interlocutory orders if order XXXVIII also relates to interlocutory orders. But as the language used in the head line is the same as used in restrictive clause of section 7 of the Code, doubts have arisen in my mind as to what is meant by 'so far as they relate to injunctions and interlocutory orders' in the section. I need hardly add that Small Cause Courts had the power under the Old Code to attach movable property before judgment and that the old practice still continues apparently in the belief that there is no difference between the old law and the new law on the point. Section 5 of Act XIV of 1882 extended Chapter XXXIV (the chapter that deals with arrest and attachment before judgment) of the Act to Small Cause Courts with the reservation that such Courts would have no jurisdiction over movable property (see 2nd schedule). The language of section 7 of the present Code is not the same as that of section 5 of the old Code. The former is restricted by express mention. The latter is extended by express

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mention. Section 17 of the Provincial Small Cause Courts Act does not help us in any way. The new Code has taken the place of the old and we are bound to follow its provisions. In spite of the head line and in spite of the fact that orders XXXVIII and XXXIX do not find a place in order L one may be inclined to think that attachment before judgment is an interlocutory order within the meaning of the Code and that Provincial Small Cause Courts have no power of attachment of any property movable or immovable before judgment. But as the point is not free from doubt I refer it to the High Court for its decision.

Babu Ram Charan Mitra for the Government.

No one for the Opposite party.

The judgment of the Court was as follows :—

November, 20.

This is a reference under rule 1, order XLVI of the Civil Procedure Code by the Munsiff of the 2nd Court at Alipore vested with Small Cause Court powers. The point referred is whether a Provincial Small Cause Court has the power to attach movables before judgment.

The provision of the Code relating to attachment before judgment is rule 5, order XXXVIII. Order L of the first schedule of the Code provides that certain portions of that schedule shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Small Cause Court under that Act. It is quite clear that there is nothing in order L to prevent Small Cause Court exercising powers of attachment before judgment.

The only other provision in the Code that requires to be considered is section 7 of the body of the Code. Under that section, sections 94 and 95 so far as they relate to injunctions and interlocutory orders, do not extend to Provincial Small Cause Courts or courts exercising the jurisdiction of a Court of Small Causes.

The referring Munsiff seems to have thought that all orders under section 94 including those under clause (b) of that section must be held to be interlocutory orders. In dealing with this reference it is not necessary to consider whether orders for attachment before judgment can under any circumstances be regarded as interlocutory orders; but we are certainly of the opinion that for the purpose of interpreting clause (b) of section 7 of the Code, an attachment before judgment is not one of the interlocutory orders there referred to. If it was intended to exclude from the jurisdiction of Small Cause Courts the powers to make any order of the nature

described in section 94, the orders "so far as they relate to injunctions and interlocutory orders" would be superfluous. In our opinion the only orders excluded are those specifically mentioned in section 94 as injunctions or interlocutory orders, that is to say, orders under clause (c) or clause (d) of section 94. We do not think that the new Code of Civil Procedure has made any change in the former law, and we answer the point referred by saying that a Provincial Small Cause Court has the power to attach movables before judgment.

D. K. R.

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CRIMINAL REVISION.

Before Mr. Justice Newbould and Sir Syed Shamsul Huda, Knight, Judge.

MONIRAM BEWA

v.

MIRJAN SARDAR AND OTHERS.*

CRIMINAL.
1919.
August, 15, 20

Jurisdiction—Injustice—Criminal Procedure Code (Act V of 1898), Secs. 145, 435-439—High Court's power of interference—Government of India Act, Sec. 107—Letters Patent, clause 56—Difference of opinion—Opinion of senior Judge prevails.

Per Newbould, J. : An omission to join a party in proceedings under section 145 of the Code of Criminal Procedure is not an error of jurisdiction : *Krishna Kamini* v. *Abdul Jubbar* (1) followed.

Per Huda, J. : Ordinarily a question of adding parties in proceedings under section 145 of the Code of Criminal Procedure does not go to jurisdiction : *Krishna Kamini* v. *Abdul Jubbar* (1) referred to.

The power of revision by High Court of cases under section 145 of the Code of Criminal Procedure is not confined to questions of jurisdiction alone. It has power of interference in all cases of injustice : *Sukh Lal* v. *Tara Chand* (2) followed.

Per Curiam : A difference of opinion between two Judges of the High Court regarding propriety of an order under section 145 of the Code of Criminal Procedure is to be dealt with under section 36 of the Letters Patent and the judgment of the senior Judge prevails : *Queen-Empress* v. *Dada Ana* (3) dissented from.

* Criminal Revision No. 596 of 1919, against an order of Babu Lalit Chandra Gupta, Sub-Divisional Magistrate of Kushtea, dated the 7th May, 1919.

(1) (1902) I. L. R. 30 Calc. 155.

(2) (1905) I. L. R. 33 Calc. 68 ; 2 C. L. J. 241.

(3) (1889) I. L. R. 15 Bom. 452.

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Moniram v. Mirjan.

Section 439 of the Code of Criminal Procedure, is to be read along with and subject to the provisions of section 435: *Hari Dass* v. *Sarifulla* (1) followed.

If a case is outside section 435 of the Code of Criminal Procedure, section 439 cannot apply to it.

Application for revision under section 107 of the Government of India Act by One of the Second Party.

The learned Sub-Divisional Magistrate declared under section 145 of the Code of Criminal Procedure, the 1st party to remain in possession of the disputed land until evicted therefrom in due course of law.

The material facts appear from the judgment of Shamsul Huda, J.

Babu Nitish Chandra Lahiri for the Petitioner.

Babus Dinesh Chandra Roy, Phanindra Lal Maitra and *Monindra Nath Roy* for the Opposite Party.

C. A. V.

August, 20.

The following judgments were delivered:

Newbould, J.: I would discharge this Rule. The decision of the Full Bench in the case of *Krishna Kamini* v. *Abdul Jubbar* (2), the omission to join a party in proceedings under section 145 is not an error of jurisdiction. Nor can I agree with my learned brother that there has been an irregularity resulting in such material prejudice as would justify our interference. There was considerable delay on the part of the petitioner. Though she says the Magistrate left Kushtia by the morning train on the 25th April, 1919, it is not stated in the affidavit that she was unable to file her petition on that account. I also think that the Magistrate had good reason for holding that the application was not made in good faith. If the petitioner really wished to prove her claim to possession she could have done so through her alleged *bargadar* Tarap Ali Shekh.

As this application is made under section 107 of the Government of India Act the decision of the senior Judge will prevail and the Rule will be discharged.

Shamsul Huda, J.: In a proceeding under section 145, Criminal Procedure Code there were three persons in the first party and twenty in the second. Of the twenty persons forming the second party all except No. 10 stated in their written statements that they had no concern with the land which belonged to Mariam Bewa. Second party No. 10 alleged that he had been cultivating about a Bigha of

(1) (1888) I. L. R. 15 Calc. 608 (617). (2) (1902) I. L. R. 30 Calc. 155.

land as Bargadar under Mariam Bewa. Apparently they took no further interest in the case, adduced no evidence and even did not cross-examine the witnesses of the first party. On the day the written statements were filed, Mariam Bewa appeared and asked to be made a party alleging that the land in respect of which there was the dispute had not been correctly described and that the boundaries given in the proceeding included land on which stood her dwelling house and part of which she cultivated. She said that the other side had been trying fraudulently to deprive her of her homestead of which she with her sons was in possession. The petition was filed before any evidence was recorded. The Magistrate rejected the application of Mariam Bewa on the ground that it was filed too late. Ultimately the Magistrate passed an order in favour of the first party in terms of section 145 of the Criminal Procedure Code.

It appears that the first date of hearing was fixed on the 14th of April, 1919 and on that day the second party applied for time alleging that the notice had been served only the day before. A similar petition was filed by the first party. The next date fixed was the 25th of April, and on that they the first party again asked for an adjournment and adjournment was given. Mariam Bewa states in her petition to this Court which is supported by an affidavit that she came to Court on that day with a petition praying to be made a party but found that the learned Sub-Divisional Magistrate had left Kustia for Khoksa by the morning train. The petition which was actually filed on the 7th of May, however shows that it was not ready before that date as the court-fee stamp was purchased on that day and the petition is itself dated the 7th of May, but it is possible that finding the Magistrate absent on the 25th of April, the court-fee stamp was not purchased on that day. There is intrinsic evidence that the application was ready before it was dated. The Magistrate in his explanation does not deny that he had left Kustia by the morning train that day. If the facts stated are correct —they are not denied by the Magistrate nor there is a counter affidavit from the other side—it is difficult to understand how it can be said that the petition was filed too late. In the muffassil so far as I am aware petitions in connection with a case are only filed on the dates fixed for hearing. If the facts stated in her petition to this Court by Mariam Bewa are correct, a grave injustice has been done to her. The land had been previously attached and a postponement of the proceedings could not have led to any serious inconvenience and ought under the circumstances to have been granted.

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Mariam Bewa alleges and the fact is not denied that the order has led to her eviction from her dwelling house which has been demolished.

The only material for the Magistrate's finding that the application is not *bonafide* is that the same muktear who filed the written statements of the second party also presented her petition for being added as a party. I need hardly say that this is a very slender material upon which to base such a conclusion. I think Mariam Bewa should have been given an opportunity to show that she was actually in possession. It is only then that the Court could form an opinion regarding the *bonafide* of her claim.

It is urged that the question of adding parties does not involve a question of jurisdiction and reliance has been placed on the Full Bench decision in *Krishna Kamini* v. *Abdul Jubbar* (1). In that case it was laid down by Mr. Justice Hill and the majority of the Judges concurred with him that *ordinarily* these questions do not go to jurisdiction. Assuming that they do not, there is no authority for the proposition that our power of superintendence is confined to questions of jurisdiction alone. In the subsequent Full Bench case of *Sukh Lal Sheikh* v. *Tara Chand Ja* (2), it was urged that this Court has the power of interference in all cases of injustice. It was conceded by the Advocate-General that the power could be exercised not only where inferior Courts had acted without jurisdiction or refused jurisdiction but also when these Courts have committed illegality or material irregularity. But in every case it must be shown that justice has been denied and Maclean C. J. in delivering the judgment of the Court observed as follows:—"In our opinion the power which is discretionary, ought in relation to cases under section 145 to be exercised with every caution. Assuming that in any particular case the Court has proceeded with irregularity, we do not think that this Court should interfere, unless it can be shown that some one has been materially prejudiced by such irregularity. If, however, the subordinate Court has acted without jurisdiction this Court will interfere."

In this case I think there are reasonable grounds for the apprehension that the action taken by the Magistrate has resulted in a serious failure of justice and I would make the Rule absolute.

I regret to have to differ from my learned brother and although his opinion prevails I have thought it necessary to express my opinion at some length regarding the merits of the case.

(1) (1902) I. L. R. 30 Calc. 155.

(2) (1905) I. L. R. 33 Calc. 68; 2 C. L. J. 241.

After the delivery of the judgments, the vakil contended that the matter should be referred to the third Judge, on which the following judgment was delivered:

In this case after we delivered our respective judgments the learned vakil for the petitioner contended that the case should be referred to a third Judge. He argues that section 439 of the Criminal Procedure Code is comprehensive enough to include all cases of revision whether the power is exercised under the Code or under any other enactment and that so far as criminal cases are concerned section 36 of the Letters Patent has been superseded by the Criminal Procedure Code. In support of his contention the learned vakil relies on the decision of the Bombay High Court in *Queen-Empress* v. *Dada Ana* (1). He also relies on two decisions of this Court in *Lalkhari Singh* v. *Sukdeo Narain Singh* (2), and in *Shaik Sujaddi Mandal* v. *F. L. Cork* (3), in which a difference of opinion regarding the propriety of an order passed under section 145 of the Criminal Procedure Code, was referred to a third Judge, instead of being dealt with in accordance with the provisions of section 36 of the Letters Patent. No great value however attaches to the last two cases because the point was not argued and it was apparently assumed that section 429 applied by the operation of section 439. There are however other cases of this Court in which a different procedure was adopted. In the case of *Mathura Sahu* v. *Damri Ram* (4), a difference of opinion regarding the propriety of a sanction under section 195 of the Criminal Procedure Code was dealt with under section 36 of the Letters Patent and the judgment of the senior Judge prevailed. This was apparently on the ground that the power exercised by the High Court under section 195 (6) of the Criminal Procedure Code was not in the exercise of an appellate or revisional jurisdiction and that the jurisdiction was original to which neither 429 nor 439 applied. A similar view was taken by a Full Bench of the Madras High Court in *Bapu* alias *Audimulam Pillai* v. *Bapu* alias *Krishnayen* (5). In an unreported case a difference of opinion between two learned Judges of this Court regarding the propriety of granting bail to an under-trial prisoner was dea with under section 36 of the Letters Patent. These cases are against the view of the Bombay High Court that the Criminal Procedure Code has overruled the provisions of section 36 of the Letters Patent.

In support of the contrary view the learned vakil for the opposite

(1) (1889) I. L. R. 15 Bom. 452.
(2) (1900) I. L. R. 27 Calc. 892.
(3) (1917) 22 C. W. N. 499.
(4) (1911) 15 C. L. J. 337.
(5) (1911-2) I. L. R. 39 Mad. 750.

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party has relied on the decision of the Full Bench of this Court in *Emperor* v. *Har Prasad Das* (1). In that case the point argued was that an order passed by a civil Court under section 476 of the Criminal Procedure Code being outside the scope of section 435 the matter could not be dealt with under 439. This contention prevailed and after stating that section 435 did not apply to the case the learned Judges observed: "Nor does section 439 touch the matter. It is clear that sections 435-439 must be read together as pointed out by Wilson, J. in *Hari Dass Sanyal* v *Saritulla* (2). Section 439 must, therefore, be read along with and subject to the provisions of section 435." This decision concludes the present question and is a clear authority for the proposition that if a case is outside section 435 as the present case is, section 439 cannot apply to it. That being so either section 36 of the Letters Patent applies or there is no law regulating the procedure. If it be held that section 36 does not apply because it only refers to original or appellate jurisdiction, we think in the absence of any provision to the contrary we should act in accordance with the principle underlying that section. We accordingly hold that in this case the opinion of the senior Judge prevails.

A. T. M. *Rule discharged.*

(1) (1913) I. L. R. 40 Calc. 477; 17 C. L. J. 245.
(2) (1888) I. L. R. 15 Calc. 608 (617).

Before Sir Asutosh Chaudhuri, Knight, Judge, and Mr. Justice Newbould.

T. R. PRATT

v.

KING-EMPEROR.*

CRIMINAL.
1920.
January, 21, 22.

Documents, production of—Criminal Procedure Code (Act V of 1898), Sec. 94—Charge upon belief—Counsel, duty of.

Under section 94 of the Code of Criminal Procedure, it is for the Magistrate to consider how many of the books are necessary for the purpose of investigation. A Magistrate should give definite instructions as to where and when the inspection is to be held and by which officer.

* Criminal Revision No. 53 of 1920, against an order of D. Swinhoe, Esq., Chief Presidency Magistrate of Calcutta, dated the 10th January, 1920.

A charge upon belief, the grounds for which belief are not stated, and no facts are given, should not be introduced in an application to the Court. It is the duty of a counsel to see upon what the charges are based before he makes them.

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Application for revision under section 435 of the Code of Criminal Procedure.

A notice was served on the petitioner on the 10th January, 1920, by the Chief Presidency Magistrate of Calcutta, to produce books and documents in his possession.

The material facts appear from the judgment.

Mr. Langford James and *Babu Manmathanath Mukherjee* for the Petitioner.

Hon'ble Mr. T. C. P. Gibbens (Advocate-General) and *Babu Manindra Kumar Bose* for the Crown.

The judgment of the Court was as follows :

January, 22.

We think that this Rule ought to be discharged. There were materials before the Magistrate upon which an order under section 94 could properly be made, and was properly made. A point was made by Mr. Pratt that he had authorised Mr. McLean to take over the books. He says that almost simultaneously he gave a direction to his officer Mr. Quayle to remove the books after Mr. McLean had taken them over. It is difficult to understand why this further order was made. It had the effect of misleading the Court. The Court made an enquiry at the time as to who was the person to give a receipt and take the books and Mr. McLean was one of the persons named. Immediately thereafter though authority was given to Mr. McLean to remove those books and to sign a receipt for them, Mr. Pratt by an order which was not made known to the Court authorised another person to take over the books from Mr. McLean. The order under section 94 was accordingly made on Mr. McLean who was going to take delivery of the books and who was going to give a receipt for them and it was not known to the Court at that time that Mr. Quayle was authorised in manner aforesaid. If the Court knew that, there would have been no difficulty in the matter. The order would have been on him to produce. We think that the order under section 94 was properly made and the books which were taken charge of ought to be in the custody of the Magistrate in the circumstances of the case.

We must say that the charges made against the Magistrate in paragraphs Nos. 14 and 17 of the petition are altogether unfounded. They certainly ought not to have been made. It is to be noted

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that both these paragraphs are merely based upon belief. The charges have been made on belief but in his affidavit Mr. Pratt swears that they are true to his knowledge. What he means, it is impossible to understand. Paragraph 14 of the petition runs thus:—"That your petitioner believes and charges that the giving directions to the said Mr. Armstrong as aforesaid to bring the books to the Court of the Chief Presidency Magistrate and the serving of the said notice were acts done in furtherance of a scheme planned in concert by the Chief Presidency Magistrate and the said Mr. Armstrong to render nugatory the orders of this Court and he further charges that the said scheme was *malafide*, in the following circumstances."

It is merely a charge upon belief, the grounds for such belief are not stated, no facts are given and we are strongly of opinion that a charge of that character should never have been introduced in the application. Learned counsel undoubtedly made his observations basing them upon the affidavit, but when charges of this character are made in Court by learned counsel I do not think that it will ever be disputed that it is his duty to see upon what the charges are based before he makes them. It seems to us that the learned counsel was misled by the paragraph as worded. He did not carefully examine the wording. We do not think that any case has been made out of *malafides* against the Magistrate. The charges are altogether improper and unjust. Even if we come to the conclusion that the books were not strictly properly or lawfully obtained from Quayle, we would certainly not have directed the books to be returned but simply directed the issue of an amended notice to be served upon Mr. Pratt for the production of those books and Mr. Pratt could not then have avoided producing them. Learned counsel appearing for the petitioner is quite justified in putting before us the circumstance that all the books which were taken by the police under the search warrant which has been declared by this Court as illegal, have again been taken possession of by the Magistrate. The way in which it was done rather indicates that it was not sufficiently considered at the time as to how many of these books were necessary for purpose of the investigation. That undoubtedly is a matter of complaint, and just complaint. But we think that in the circumstances of this case an enquiry now would sufficiently safe-guard the interests of the petitioner.

The learned Advocate-General appearing for the prosecution says that he is prepared to have such an enquiry made in the presence of the other side, and we direct the Chief Presidency Magis-

trate to have that enquiry as quickly as possible in the presence of the other side and to determine which of the books are necessary to be kept. He must in this connection take into consideration any undertaking which may be given by the petitioner or his attorney for the production of the books as required, but which the Magistrate may now direct to be returned. We need hardly point out that only such books as may be urgently required for purposes of the case ought to be kept and no more. Mr. Pratt complains that his business has been seriously prejudiced and the retention of current books interferes with his work. The learned Advocate-General says that he is prepared to give him facilities for carrying on his business and will help him to get such books as may be necessary. This matter also ought to be taken into consideration by the Magistrate.

Then there is a further matter, about the method of inspection of the books which may be kept. We direct the Magistrate to give definite instructions as to when and where the inspection is to be held and by which officer. It is conceded that such inspection ought to be made in the presence of the petitioner. We direct that to be done. With these directions we discharge the Rule.

Mr. Langford James wants it to be added that he takes the fullest responsibility for the observations which were made by him based upon paragraphs 14 and 17. Since he takes the responsibility we have nothing further to say. We only wish to emphasise what we have already said that charges of this character ought not to be made except on facts and then only after due consideration. We hope the profession will bear that in mind.

A. T. M. *Rule discharged.*

APPELLATE CRIMINAL.

Before Sir Syed Shamsul Huda, Knight, Judge, and Mr. Justice Duval.

CRIMINAL.

1919.

July, 31.
August, 1, 6.

KASEM ALI AND OTHERS

v.

EMPEROR.*

Thieves, gang of, belonging to—Approver, witness—Approver, evidence of—Penal Code (Act XLV of 1860), Sec. 401—Habit—Criminal Procedure Code (Act V of 1898), Sec. 234—More offences than one—Association extending over a long period—Criminal Procedure Code, Sec. 110, conviction under, nature of—Accused, if can be punished for subsequent offence—Evidence of previous conviction, if admissible—Document prepared by parties, if to form part of judgment.

After the discharge of an accused approver, he is competent to be a witness. His evidence is admissible against other accused persons.

The gist of an offence under section 401 of the Indian Penal Code, is association for the purpose of habitually committing theft or robbery. Habit is to be proved by the aggregate of acts, and though the charge is charge of a single offence, the period over which the association extends is often very long and the longer the period the better it is to establish habit. The question of confining the charges to three in the course of a year, therefore, does not arise and section 234 of the Code of Criminal Procedure has no application: *Sriram Venkatasami* v. *Emperor* (1) followed.

A conviction under section 110 of the Code of Criminal Procedure has nothing to do with the punishment of an offence. An order under section 110 is only preventive and only binds down the accused to be of good behaviour.

An accused after having once been bound down under section 110 of the Code of Criminal Procedure, can again be punished for being members of a gang associated for the purpose of habitually committing crimes under section 401 of the Indian Penal Code.

Evidence of previous conviction for an offence under the Indian Penal Code, or evidence to show that the accused had been previously bound down under section 118 of the Code of Criminal Procedure, is inadmissible.

Quaere: Whether if it can be shown that in a previous case a number of accused were placed on their trial together and convicted, such conviction can be used not for the purpose of proving the conviction or proving bad character but for proving association.

It is generally not desirable to make documents prepared by parties to a case part of a judgment.

* Criminal Appeals Nos. 101 and 95 of 1919, against the order of Babu Rajani Kanta Rai Dastidar, Special Magistrate of Sylhet, dated the 23rd December, 1918.

(1) (1871) 1 Weir 452.

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KASEM v. EMPEROR.

Per Duval, J.: No one can be convicted on the uncorroborated evidence of an approver.

Appeals under section 408 (b) of the Code of Criminal Procedure.

The accused were charged under section 401 of the Indian Penal Code, as belonging to gang of thieves. Two out of 34 accused persons were acquitted and the rest were sentenced to various terms of imprisonment.

The material facts appear from the judgment.

Mr. Kabiruddin Ahmed and *Babu Birbhusan Dutt* for the Appellants.

Mr. Orr and *Babu Manindra Nath Banerjee* for the Crown.

C. A. V.

August, 6.

The following judgments were delivered:

Shamsul Huda, J.: Thirty-four persons were placed on their trial on a charge under section 401 of the Indian Penal Code. The trial was held by a Magistrate specially authorised under section 30 of the Code of Criminal Procedure. The trial lasted a long time in the course of which 314 witnesses were examined. The Magistrate acquitted two of them and convicted the rest. Three of them were sentenced to more than four years rigorous imprisonment and they have appealed to this Court under section 408 (b) of the Code:

The facts of the case are briefly as follows:—Proceedings under section 110, Criminal Procedure Code were taken in the year 1917 against Mason Haji and others including two of the appellants Munshi and Jaban. Mason Haji made a confession which led to an enquiry and the local Government appointed M. Mufizar Rahaman to verify the confession made by Mason. M. Mufizar Rahaman then recorded the confession of Mason at greater length than it was taken down before and went on to verify the statements made to him. The accused were then sent up for trial. On the 14th June, 1918, the charge against Mason was withdrawn by the Public Prosecutor under section 494, Criminal Procedure Code and he was discharged. Mason's confession formed the basis of the present charge. The learned Magistrate has in an exhaustive judgment dealt with the whole evidence in the case and he has considered separately the case of each individual accused. The evidence against each accused has been separately detailed in the judgment and it is unnecessary to repeat it.

Several points have been argued by the learned counsel who appeared on behalf of the appellants. The first argument is that the Magistrate in discharging Mason did not give judicial consideration

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to the case and therefore the order of discharge is illegal and has no legal effect. As to this argument I need only say that upon the reported decisions, it is enough that the accused person had been discharged before he gave his evidence and was not on his trial when such evidence was given. This in my opinion is quite sufficient to make his evidence admissible.

The next point argued was that the charge was bad having regard to the provisions of section 234, Criminal Procedure Code. It seems to me that there is no substance in this contention. Section 234 lays down that when a person is accused of more offences than one of the same kind committed within the space of 12 months, he may be charged with and tried at one trial for any number of them not exceeding three. In this case the accused were not charged for more offences than one. They are charged with one offence only. An offence under section 401 is a special one. The gist of the offence is association for the purpose of habitually committing theft or robbery and as pointed out by the Madras High Court in *Sriram Venkatasami* v. *Emperor* (1), habit is to be proved by the aggregate of acts, and though the charge is charge of a single offence the period over which the association extends is often very long and the longer the period the better it is to establish habit. The question of confining the charges to three in the course of a year, therefore does not arise in the case and section 234 has no application.

The next point urged is that the accused having been bound down under section 110 Criminal Procedure Code they cannot again be punished for being members of a gang associated for the purpose of habitually committing crimes under section 401 Indian Penal Code. This it is urged is punishing a man twice over for the same offence. It is clear that a conviction under section 110 Criminal Procedure Code has nothing to do with the punishment of an offence. The order under section 110 Criminal Procedure Code is only preventive and only bound down the accused to be of good behaviour. It was not a punishment for any offence committed by them.

It is also urged that the confession of Mason recorded by Moulavi Mufizar Rahman and consequently the evidence of verification by that officer are not admissible. This may be so but after making the confession the approver has repeated his story in Court in his evidence on oath and therefore the question of the admissibility of the confession is of no practical importance and though I am of opinion that the confession was of no value as a piece of evidence, that does not affect the merits of the case.

(1) (1871) 1 Weir. 452.

It has next been urged that the evidence of previous conviction for an offence under the Indian Penal Code, or evidence to show that the accused had been previously bound down under section 118 Criminal Procedure Code was inadmissible. Reliance has been placed on decisions of this Court in *Mankura Pasi* v. *Queen-Empress* (1), and in *Kader Sundar and others* v. *The Emperor* (2). I think this contention is sound and the evidence of previous conviction was wrongly admitted, although there may be some doubt whether if it can be shown that in a previous case a number of the accused were placed on their trial together and convicted, such conviction can be used not for the purpose of proving the conviction or proving bad character but for proving association.

In my opinion leaving aside the evidence which I have held to be inadmissible, the rest of the evidence is ample to establish the guilt of the appellants. The evidence which has been detailed by the learned Magistrate in his judgment shows that the accused often met together at different places before or after the commission of offences and have been seen on various occasions carrying any stolen articles or seen together under circumstances that suggested their complicity in thefts and robberies and their association for the purpose of habitually committing such offences. This evidence is very strong: specially against the three appellants. Mason Haji speaks of 74 thefts or burglaries out of which the accused Kasem Ali is said to have taken part in eleven, Jaban in thirty-one and Munshi in eleven. No reason has been shown why the numerous witnesses who have deposed on behalf of the prosecution and who have been believed by the learned Magistrate should be disbelieved by us. I may also state that in the appeal that was preferred by the other accused persons who were sentenced to less than 4 years rigorous imprisonment the learned Sessions Judge has upheld the conviction and believed the evidence upon which the conviction of the present appellants is largely based.

It has been complained before us that the Magistrate was wrong in placing on the record certain statements prepared by the Public Prosecutor and in making them a part of his judgment. No doubt it is generally not desirable to make documents prepared by parties to a case part of the judgment, but in this case as I have said the record was voluminous and the statements do not furnish any new materials, but are simply the result of the examination of the evidence by the Public Prosecutor if the learned Magistrate had taken

(1) (1899) I. L. R. 27 Calc. 139. (2) (1911) 16 C. W. N. 69.

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Shamsul Huda, J.

those statements on trust there might have been some ground for complaint. But in this case the Magistrate has recorded and he has done so on every page of these statements that he has checked them himself. Under these circumstances I do not think that the accused have been in any way prejudiced by the action of the Magistrate. The convictions and sentences are therefore upheld and the appeals are dismissed.

Duval, J.—I agree with the judgment of my learned brother. As to the tabular statements I would like further to point out that though the learned counsel objected to them as being wrongly incorporated in the judgment it is clear that they were checked by the Magistrate and the learned counsel has not been able to show to us that in any single particular these statements which are really an epitome of the evidence put in a tabular form are incorrect. The learned counsel though he did not enter into details about individual witnesses make some comments on the oral evidence in general. As to the approver his position was that as he has been discharged under section 494 Criminal Procedure Code his evidence should be expunged from the record. My learned brother has dealt with that matter and I agree in holding that after his discharge he was a person competent to be a witness. Then as to his evidence, in Court and his confessions recorded by Mr. P. C. Chatterjee and M. Mafizar Rahman no doubt the earlier confessions could have been used by the defence for the purpose of contradicting what the approver Mason said in the course of the trial, and indeed it appears that there are certain discrepancies between his evidence during the course of the trial and his confession before Mr. Chatterjee. It is urged that as approver he is an unreliable witness, and of course no one can be convicted on the uncorroborated evidence of an approver. But here we have, before us a large mass of corroborative evidence. There is first the evidence of association. This evidence shows that these accused and others were frequently seen together, specially at *hats* and there is evidence that shortly after they were seen together thefts and robberies used to take place; and as to three men whose cases are before us we have a mass of direct evidence, against Kasem of robberies in houses, bazars and boats, against Jaban of robberies in houses and boats and against Munshi of robberies and thefts in shops and boats as well as thefts of cattle. We also have the evidence about Kasem and Jaban being engaged in the same thefts. The evidence shows that several of the accused were originally pilots of steamers: and after their dismissal from the steamer Company's service theft on river steamers

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Duval, J.

and boats plying on the river and at the riverside bazars became frequent; and in addition to these thefts in boats and bazars the gang also engaged in thefts and robberies in houses and in regular systematic theft of cattle. On the evidence adduced I hold that the existence of a gang for committing theft and burglaries has been amply proved further that the three men before us were members and (I should add) leaders of that gang.

A. T. M. *Appeals Dismissed.*

CIVIL RULE.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr. Justice Walmsley.

CIVIL.
1920.
January, 28.

ABDUL SHEIKH

v.

MAHAMMAD AYUB.*

Limitation—Review—Small Cause Court decree—No deposit of cost in time—Provincial Small Cause Courts Act (IX of 1887), Sec. 17—Limitation Act (IX of 1908), Sec. 5.

A suit was brought by the plaintiff in the Small Causes Court for Rs. 125 and at the first hearing the suit was dismissed with costs. On the 15th day the plaintiff made an application for review of judgment without depositing the costs. After the expiry of the period of limitation, on the application of the plaintiff, Court made an order that the amount of costs should be deposited within a fixed time. The deposit being made the Court entertained the review and eventually gave judgment for the plaintiff:

Held, that the order granting the review of judgment was not in accordance with law and that the review should not have been entertained.

Quære: Whether section 5 of the Limitation Act is applicable to such a case.

Application for revision under section 25 of the Provincial Small Cause Courts Act by the Defendant.

Suit for money.

The material facts appear from the judgment.

Babu Urukramdas Chakravarti for the Petitioner.

* Civil Rule No. 497 of 1919, against an order of Babu Probodh Chandra Bose, Small Cause Court Judge, Berhampur, dated the 16th August, 1919.

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1920.

Abdul Ayub.

January, 28.

Babu Hemendra Nath Sen for the Opposite Party.

The Judgments of the Courts were as follows :

Sanderson, C. J. : This is a Rule which was obtained by the defendant in a suit which was brought in the Small Cause Court of the Subordinate Judge at Berhampore.

The suit was brought by the plaintiff for Rs. 125, and at the first hearing the suit was dismissed, and I assume, it was dismissed with costs. Thereafter, the plaintiff made an application for review of judgment. The ground of the application was that he had discovered new evidence which he could not have discovered before by the exercise of due diligence. The learned Judge entertained the application for review, and eventually gave judgment for the plaintiff.

This Rule has been supported on the ground that the plaintiff did not comply with the provisions of section 17 of the Provincial Small Cause Court Act of 1887. It is clear that under the provisions of article 161 of the Limitation Act of 1908, the period, within which an application for review of a judgment given by a Provincial Court of Small Causes must be made, is fifteen days from the date of the decree or order. It appears from the learned Judge's judgment that the application was made on the last day of the fifteen days, allowing the plaintiff one day for taking a copy of the judgment. It is provided by section 17 of the Provincial Small Cause Court Act that "An applicant for an order to set aside a decree passed *ex parte* or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment or give security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, as the Court may direct." The plaintiff did not comply with the provisions of section 17, but on the following day the Court, I assume upon the application of the plaintiff, made an order that the amount of costs should be deposited within four days. The amount of costs was not so deposited, and a further order was made on the 2nd of July granting the plaintiff five more days, and eventually the amount of costs was deposited on the 5th of July, 1919. The learned Judge has said that in his opinion section 5 of the Limitation Act applies to this case, and applying section 5 he has extended the period for making the application for review up to the 5th of July, the date upon which the amount of costs was deposited, I think it is doubtful whether section 5 of the Limitation Act applies to this case at all, because it seems to me that the application for review was made within time, and consequently it may be urged that section 5 does not apply at all. But

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assuming for the sake of argument that section 5 does apply, then it is incumbent upon the plaintiff to show that he had sufficient cause for not making the application within the time specified. I fail to understand on what ground it can be said that the plaintiff had sufficient cause for not making his application not only within the proper time but in the proper manner by depositing the amount of costs or giving security for the same at the time of making the application. The learned Judge seems to have thought that the plaintiff may have been misled by the orders of the Court. So far as I understand the dates, there was no order of the Court made until after the period within which the application should have been made and in a proper manner in accordance with the provisions of section 17 of the Provincial Small Cause Court Act.

For these reasons in my judgment the Rule should be made absolute, and the order granting a review of judgment should be set aside, and the application for review dismissed.

The defendant must have the costs of this Rule—hearing-fee, one gold mohur, and also the costs of the application for review.

Walmsley, J.—I agree.

A. T. M. *Rule made absolute.*

APPELLATE CIVIL.

Before Mr. Justice N. R. Chatterjea and Mr. Justice Panton.

NABIN CHANDRA SAHA AND OTHERS

v.

SHEIKH WAJID AND OTHERS.*

CIVIL.
1919.
December, 3, 5.

Limitation—Dispossession—Private purchase—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3.

The plaintiff and certain other persons were the heirs of A. The defendants Nos. 1 and 2 were the co-sharer landlords of the jote which was held by A. On the death of the latter, the defendants Nos. 1 and 2 dispossessed the plaintiff from the land, they having secured a *kabala* of the entire land from defendant No. 8, one of the heirs of A. In a suit for joint possession in respect of the plaintiff's share of the land :

* Appeal from Appellate Decree No. 1206 of 1917, against the decree of Babu Jitendra Prosad Chatterjee, Subordinate Judge, 4th Court, of Mymensingh, dated the 1st March, 1917, affirming that of Babu Lalit Mohan Bosu, Munsiff, 1st Court, at Kishoreganj, dated the 28th February, 1916.

CIVIL.

1919.

Nabia
v.
Wajid.

Held, that the suit was governed by article 3 schedule III of the Bengal Tenancy Act.

Cases on the subject discussed.

Appeal by Defendants Nos. 1 to 3.

Suit for joint possession.

The material facts appear from the judgment.

Babu Gopal Chandra Das for the Appellants.

Babu Santimoy Majumdar (for Babu Gurudas Sinha) for the Respondents.

C. A. V.

The judgments of the Court were as follows :

December, 5.

The plaintiff and certain other persons were the heirs of one Rajabulla. The defendants Nos. 1 and 2 were the co-sharer landlords of the jote which was held by Rajabulla. On the death of the latter, the defendants Nos. 1 and 2 dispossessed the plaintiff from the land, they having secured a kabala of the entire land from defendant No. 8, one of the heirs of Rajabulla.

The plaintiff brought a suit for joint possession in respect of his share of the land and the question raised in the case is whether the suit is governed by the provisions of article 3, schedule III of the Bengal Tenancy Act.

There is a divergence of judicial opinion with respect to the scope of article 3, schedule III ; and in some cases it has been held that the article is inapplicable to a case where the dispossession is effected by the landlord not as landlord but as auction-purchaser and under process of the Court : see *Abhoy Churn Mookerjee* v. *Sheik Titu* (1) ; *Brojo Kishore Mahapatra* v. *Saraswati Dassi* (2) ; *Mahomed Khalil* v. *Hirendra Nath Bhattacharya* (3) ; *Kamaldhari Thakur* v. *Rameshur Singh Bahadur* (4) ; *Ram Kinkar* v. *Sthiti Ram* (5).

On the other hand, a different view has been taken in the following cases ; *Amiruddin Munshi* v. *Ulfatunissa Bibi* (6) ; *Fani Bhusan Sarkar* v. *Pulin Chandra Mondul* (7) ; *Satish Chandra Bosu* v. *Nittya Gopal Halder* (8) ; *Pitambar Mohapatra* v. *Bhagabat Lal* (9) ; *Jaimangalabati Misrain* v. *Jharu Lal Das Mozamdar* (10).

(1) (1897) 2 C. W. N. 175.
(2) (1901) 6 C. W. N. 333.
(3) (1906) 5 C. L. J. 650.
(4) (1913) 17 C. W. N. 817.
(5) (1917) 27 C. L. J. 528.
(6) (1908) 9 C. L. J. 131, 13 C. W. N. 198.
(7) (1916) 21 C. W. N. 976.
(8) (1917) 21 C. W. N. 978.
(9) (1914) 24 I. C. 860.
(10) (1917) 2 Patna L. J. 567.

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v.
Wajid.

Having regard to the difference of opinion on the point, the question was referred to a Full Bench in S. A. Nos. 1224 to 1226 of 1917; but it was held that the question referred did not arise in this case because the dispossession was subsequent to the symbolical possession delivered to the landlord and was made at a time when the plaintiff was in possession as tenant under the landlord. The cases cited above, except the case of *Jaimangulabati* v. *Jharu Lal* (1) were all cases in which the question arose between the plaintiff and the landlord after the latter had purchased the property at an execution sale. In the present case, there is no question of an auction-purchase by the landlord.

It is contended, however, on behalf of the respondent that the principle laid down in the first set of cases would apply also to a case of a private purchase; because in both cases the purchase is made by the landlord not in his capacity as landlord, but as a purchaser; and we have been asked to refer the case to a Full Bench, having regard to the divergence of judicial opinion on the point.

We do not think, however, that the matter should be referred to a Full Bench; for, the case of a private purchase does not stand on the same footing as a purchase at an execution sale. In the case of *Ram Kinkar* v. *Sthiti Ram* (2) already referred to, Mookerjee, J. stated "It is plain that article 3 of the third schedule to the Bengal Tenancy Act has no application to the case before us. It is well settled that where a landlord, in execution of a decree for arrears of rent puts the holding to sale, purchases it himself and obtains delivery through Court, such dispossession of the tenant is not dispossession within the meaning of article 3: *Kamaldhari* v. *Ramsikur* (3) Indeed, so long as the sale remains in force, the possession of the landlord auction-purchaser cannot possibly be challenged by way of suit." It was also pointed out in the case of *Kamaldhari Thakur* v. *Rameshur Singh Bahadur* (4) that although the landlord moves the Court to deliver possession and possession is delivered to him at his instance, he gets possession through the intervention of the Court; "The delivery of possession by which the dispossession is effected is an act of the Court, and when the landlord gets into possession by a process of the Court, we do not think it is an act of dispossession by the landlord within the meaning of the article which contemplates a dispossession by the landlord by taking the law into his own hands and otherwise than in due course of law." A similar view was taken by Banerjee J. in the case

(1) (1917) 2 Pat. L. J. 567.
(2) (1917) 27 C. L. J. 528.
(3) (1913) 17 C. W. N. 817.
(4) (1913) 17 C. W. N. 817 (818).

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Nabin
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of *Brojo Kishore Mahapatra* v. *Saraswati Dassi* (1), where the learned Judge says "That the dispossession here was in that capacity and under a process of Court issued to put the defendant in possession as auction-purchaser, has in effect, been found by the Courts below and is not disputed." When the landlord purchases at a sale held in execution of a decree, possession is delivered to him by the Court as auction-purchaser, i.e. on the footing that there is no longer any relation of landlord and tenant between him and the tenant, and the possession of the landlord as purchaser cannot be challenged so long as the sale is not set aside or declared ineffective against the tenants. In the case of a private purchase such as the present, there is a relation of landlord and tenant between the plaintiff and the defendant and the mere fact that he obtained a kabala from one of the heirs of the original tenant cannot take the case out of the purview of article 3 schedule III.

Having regard to all these considerations, we think that the case does come under article 3, schedule III of the Bengal Tenancy Act. The appeal is decreed and the suit must accordingly be dismissed. The appellant will be entitled to half the costs in all Courts.

A. T. M. *Appeal decreed.*

(1) (1901) 6 C. W. N. 333.

Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and Mr. Justice Panton.

CIVIL.
1920.
January, 6.

MADHABI SUNDARI DASYA AND OTHERS

v.

SYAMA CHARAN BISWAS AND OTHERS.*

Presumption—Standard of measurement—Suit for additional rent.

In a suit for additional rent for additional area, it was found that the standard of measurement set up on behalf of the plaintiff was inconsistent with the Kabuliat upon which the suit was based:

Held, that the present standard of measurement could not be presumed to be the standard in use at the time of the inception of the tenancy.

* Appeals from appellate Decrees Nos. 1717, 3201, 3203 to 3206 of 1915, against the decision of G. S. Dutt, Esq., Special Judge of Faridpur, dated the 1st June, 1915, reversing that of Babu Probhat Chandra Sen, Assistant Settlement Officer of Ballakandi, dated the 10th November, 1914.

CIVIL.

1920.

Madhabi Sundari v. Syama Charan.

Appeals by the Plaintiffs.

Suit for additional rent for additional area.

The material facts appear from the judgment.

Dr. Dwarka Nath Mitter and *Babu Manindra Nath Mitter* for *Babu Baikant Nath Mitter)* for the Appellants.

Babus Biraj Mohan Majumdar and *Bepin Behari Mullick* for the Respondents.

The judgment of the Court was as follows :

January, 6.

The question involved in these cases is whether the landlord is entitled to additional rent for additional area.

The plaintiff proved that there was measurement in 1276 and adduced evidence to show what the standrard of measurement was in that year. The learned Special Judge, however, has disbelieved that evidence.

It is contended before us that the present standard of measurement ought to have been presumed to be the standard in use in 1276, and reliance is placed upon the judgment of Mookerjee, J in the case of *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (1).

It is unnecessary to consider the effect of the passage in the judgment of Mookerjee, J. at page 132 in that case, because in the present case the learned Special Judge finds that the standard of measurement set up on behalf of the plaintiff would be inconsistent with the Kabuliat upon which the suit is based; and he points out several circumstances showing that the standard of measurement set up could not be correct.

We are therefore unable to hold that the learned Special Judge has committed an error of law in holding that the plaintiff has failed to prove that the defendants were holding any land in excess of the area for which they were paying rent.

It may be mentioned that no case of encroachment beyond the boundaries mentioned in the lease was made in the plaint, nor found by the Court below.

In the circumstances, the appeals must fail and are dismissed with costs.

A. T. M. *Appeals dismissed.*

(1) (1905) 2 C. L. J. 125 (132).

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.

CIVIL.

1919.

June, 20, 23.

HEM CHANDRA CHOWDHURY

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS.*

Land acquisition—Market value—Hypothetical landlord and tenant—Vacant land.

The land when acquired, was vacant. Both the Collector and the Land Acquisition Judge in making the award assumed the existence of a hypothetical tenant on each plot and calculated the respective values of what were designated as landlord's interest and raiyat's interest. The total of the sums which represented the value of these interests was taken as the value of the land:

Held, that the award was based on unsound principle.

How much was recoverable by a landlord from a hypothetical tenant might be determined with some approach to accuracy from the rent receivable by him. But the exact value of the raiyat's interest was dependant on a number of unknown factors.

Appeal by the Plaintiff Petitioner.

The material facts appear from the judgment.

Babus Ram Charan Mitra and *Sris Chandra Chowdhury* for the Appellant in No. 13 and Respondent in No. 20.

Mr. Pugh, *Babus Joges Chunder Roy*, *Ramani Mohan Chatterjee* and *Prematha Nath Banerjee* and *Moulvi Abdul Hai* for the Respondent in No. 13 and Appellant in No. 20.

The judgment of the Court was delivered by

June, 23.

Mookerjee, J.: These two appeals are directed against the same award made by the Land Acquisition Judge of Pabna and Bogra, in respect of lands acquired for public purposes. Appeal No. 13 of 1918 has been preferred by the Secretary of State on the ground that the sum awarded is excessive and has been calculated on an erroneous principle. Appeal No. 20 of 1918 has been preferred by the claimant on the ground that the sum awarded is insufficient. We are clearly of opinion that there is no foundation for the appeal of the claimants. Reliance has been placed upon conveyances of lands which have no similiarity to the lands acquired; and we cannot possibly enhance the amount of compensation

* Appeals from Original Decrees Nos. 13 and 20 of 1918, against the decision of E. Sells, Esq., Additional District Judge of Pabna and Bogra, dated the 9th October, 1917.

on the basis of those transactions. The really substantial appeal is that preferred by the Secretary of State. The Senior Government Pleader has contended that the award as made by the Judge is based on unsound principle. The land when acquired was vacant. But both the Collector and the Land Acquisition Judge have assumed the existence of a hyphothetical tenant on each plot and have calculated the respective values of what was designated as landlord's interest and raiyat's interest. The total of the sums which represent the values of these interests has been taken as the value of the land. The Land Acquisition Judge has accepted the figures of the Collector in respect of the valuation of landlord's interest; but he has substantially raised the figures for the valuation of raiyat's interest. The Government pleader has argued that what the lower Court has done in substance is to award to the claimant in the shape of the value of the raiyat's interest, the entire value of the land and has added thereto the value of the so-called landlord's interest calculated by the Collector who had adopted an entirely different basis for the calculation of the raiyat's interest. In our opinion, this criticism is well-founded. The method adopted by the Collector and the Judge is wholly unreliable and is not based on any solid foundation. How much is recoverable by a landlord from a hypothetical tenant may be determined with some approach to accuracy from the rent receivable by him. But the exact value of the raiyat's interest is dependant on a number of unknown factors; for instance if the imaginary raiyat were to sell his tenancy in the open market, the value it would fetch would depend upon his status. It is conceivable that he may not have any transferable interest at all. It is possible that he may be a tenant for a term and that his tenancy may be transferable only with the assent of the landlord. It may be, again, that his rent is not fixed in perpetuity, and is enhanceable. It is obvious that a purchaser of such a tenancy would offer a price in view of the circumstances and conditions of the tenancy. Consequently to assert that the value of a raiyat's interest is so much without specification of the conditions of the tenancy is obviously unsound. We must therefore reject the figures given by the Collector as also by the Judge. But this places us in a difficulty. Are there really materials on the record which may enable the Court to determine the market value of the lands on some sound principle. If one of these plots was offered for sale as a vacant piece of land, the purchaser, in making an offer, would obviously have in view the income likely to be derived from it. Now, it has been found that the land can be let out at a rent of Rs. 24 per bigha, so that if 20 years purchase

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1919.
Hem Chandra v. Secretary of State for India in Council.
Mookerjee, J.

is taken, this would give a rate of Rs. 480 per bigha. But, at the same time, the landlord who let out land to a tenant would in ordinary circumstances demand a premium and if the interest of the tenant were not permanent and transferable, he would ask for a premium on each transfer. There is no evidence on the record to show precisely what may be derivable by the landlord in these contingencies. But in view of the facts which have been stated to us, we are of opinion that substantial justice will be done if in addition to Rs. 480, we allow the landlord another Rs. 100. This judgment will affect the awards in respect of two plots—313 and 314—where the lower Court allowed, in addition to the valuation of the raiyat's interest, the value of the so-called landlord's interest. In these two cases the award will be diminished from Rs. 680 to Rs. 580. In respect of the other plots, we do not think it necessary to reduce the sums awarded.

The result is that the appeal of the Secretary of State (No. 13 of 1918) will be allowed and the decree of the Court below will be varied as indicated above. There will be no order for costs. The appeal of the claimant (No. 20 of 1918) is dismissed with costs to the Secretary of State.

Appeal No. 13 of 1918 allowed.
Appeal No. 20 dismissed.

A. P. M.

Before Mr. Justice N. R. Chatterjea and Mr. Justice Panton.

CIVIL.
1919.
December, 8.

KALI CHARAN SAHA

v.

HARI MOHAN BASAK AND OTHERS.*

Insolvency, application for—Several debtors—Mitakshara joint family.

A joint application against 7 persons, members of a joint family, who are jointly liable, for insolvency, is not maintainable : *Sarada* v. *Ram Sukh* (1) followed.

Appeal by the Petitioner.

Proceedings under the Provincial Insolvency Act.

The material facts appear from the judgment.

* Miscellaneous Appeals Nos. 396 and 407 to 412 of 1917, against the decision of M. Smither, Esq., District Judge of Dacca, dated the 13th September, 1917.

(1) (1905) 2 C. L. J. 318.

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Babus Upendra Lal Roy and *Kunja Lal Das* for the Appellant.

Dr. Sarat Chandra Basak and *Babu Jitendra Kumar Sen Gupta* for the Respondents.

The judgment of the Court was as follows:

These appeals arise out of proceedings under the Provincial Insolvency Act (III of 1907).

The appellants before us applied in the Court below for adjudging seven persons who were members of a Hindu joint family, insolvents by one single petition. The learned District Judge on the 22nd August, 1917, held that seven applications must be made as seven different persons were sought to be declared insolvents. In pursuance of that order, on the 8th September 1917, six more applications were made, each praying to have seven persons declared insolvent. The learned District Judge thereupon pointed out that this was bad and that there must be a separate petition regarding each person. On the 12th September, 1917, six other petitions were filed. On the next day 13th September these six petitions and a petition for amendment of the original application were heard. The learned District Judge was of opinion that a declaration of insolvency could not be asked for in one petition for or against more than one person, and that the objection to a joint application by joint debtors which was pointed out in the case of *Sarada Prasad Ukil* v. *Ram Sukh Chandra* (1), applied to an application made *against* several joint debtors; and pointed out that the creditors of each individual must have notice, and the claim of each creditor against each debtor must be investigated. The learned Judge accordingly held that a single application against seven debtors could not be maintained and he allowed the original application to be amended by striking out six names from it; but as regards the six new applications, he held that they could have effect from the date on which they were filed and not from the date of the original application, the result being that as against the six debtors the petitions were filed too late to give the petitioner the benefit of section 37 of the act.

The petitioner has appealed to this Court and the first ground taken is that an application can be maintained against several debtors jointly.

We think that the reasons given in the case of *Sarada Prasad Ukil* v. *Ram Sukh Chandra* (1), (though that case was decided under Chapter XX of the Civil Procedure Code) apply to an application made against several debtors who are jointly liable.

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The next contention is that an application can be made against several partners as a firm, and that therefore the original application was valid.

There is no doubt provision in the English Bankruptcy Act that any two or more persons being partners or any person carrying on business under a partnership name may take proceedings or be proceeded against under this Act in the name of the firm (section 119 of the English Bankruptcy Act). There is a similar provision in the Presidency Town Insolvency Act (see section 99). There is, however, no such provision in the Provincial Insolvency Act. But it is unnecessary to consider the question in the present case, because even if partners can be proceeded against in the name of the firm under the Provincial Insolvency Act, the respondents were not proceeded against as partners or as a firm. In the application for insolvency, these respondents were described as having inherited a sweetmeat shop from their father and as holding it as a joint family property, and it was prayed that the said debtors might be adjudged insolvent. In the subsequent petition filed on the 8th September, 1917, it was stated that "as the debtors are seven brothers and as they contracted the debts and caused insolvency proceedings to be taken while living as members of a Hindu joint family, so all of them are jointly and severally liable to the creditors for their dues." It appears therefore that throughout the proceedings these respondents were treated not as partners or as members of a firm but as members of a Hindu joint family. In these circumstances, we think that one joint application against them all could not be maintained.

It is contended that it is a question merely of amendment. But so far as the original application could be amended by striking out the names of six other persons and retaining the name of one, it has been allowed by the learned District Judge. The six other applications were not applications for amendment of the original application but six different applications against each of those persons and we are unable to hold in these circumstances that the District Judge was wrong in taking the view that these six applications could not be treated as having been filed on the 4th January—the date of the original application.

The appeals are accordingly dismissed with costs—two gold mohurs in all—to be paid to respondent Hari Mohan Basak. In M. A. No. 396, we assess the hearing-fee at one gold mohur, and in the other six cases (M. A. Nos. 407 to 412) we allow one gold mohur as costs to be equally divided.

A. T. M. *Appeals dismissed.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir John Woodroffe, Knight, Judge, and Mr. Justice Walmsley.

JOSEPH PERRY

v.

THE OFFICIAL ASSIGNEE OF CALCUTTA.*

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Insolvent—Charge against—Presidency Towns Insolvency Act (III of 1909), Secs. 36, 103 A (1)—Charge, error or irregularity in, effect of—Charge of alternative intentions—Notice of charge—'Concealing'—Preventing production—Removing a document—Books purposely withheld, how to prove—Appellate Court, power of—Finding on a charge—Omission by trial Court—Voluntary statement—Statement by accused in examination without objection—Evidence Act (I of 1872), Secs. 17, 132—Admission—Statement of the accused in former proceeding—Compulsion—Illegal compulsion—Court's power to examine an insolvent—Witnesses' story, part of.

No error or irregularity in a charge framed in a proceeding under the Presidency Towns Insolvency Act, will call for a reversal of an order unless it in fact has occasioned a failure of justice and in determining whether there is so the Court shall have regard to the fact whether the objection could, and should have been, raised in an earlier stage of the proceedings.

If an accused receives notice that the prosecution may seek to prove against him either of two alternative intentions he cannot, as he must be ready to meet a charge, in respect to both, be prejudiced by a charge of having had both intentions. Concealing is a form of defeating the object of the Presidency Towns Insolvency Act, and therefore, the second intention must refer to other modes of defeating the Act. There is nothing to prevent an accused having had both intentions.

It is generally necessary that an insolvent should have notice of the charge which it is proposed to make against him.

Removing a document is a mode of preventing its production and therefore a notice to the effect "surreptitiously and dishonestly removed or caused to be removed from the custody of the Official Assignee your diary for 1918," is sufficient, though the terms of this offence are not those mentioned in section 103 of the Presidency Towns Insolvency Act.

To establish that books are purposely withheld, it must be shown that they exist, for preventing presupposes existence.

The appellate Court with all the materials before it, can, in appeal, make a finding of the intent, if this was omitted *per curiam* by the Judge.

The words "Any person" in clause (2) of section 36 of the Presidency Towns Insolvency Act, refer to the same words in clause (1). Such person may be brought up for examination. But this cannot be the insolvent.

The Court has power to examine an insolvent even if section 36 of the Act were not applicable. The Court must have full control of an insolvent.

* Appeal from Original Civil No. 52 of 1919, against the decision of Mr. Justice Rankin, dated the 6th June, 1919.

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A statement made by an insolvent in his examination without objection from him, is voluntary.

Section 132 of the Evidence Act makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only.

Answers given by the insolvent accused on the former proceedings are admissions under section 17 of the Evidence Act; they are relevant and admissible unless excluded by sections 18 to 31 of the same Act. Even therefore assuming the examination of an insolvent was not authorised, the answers given on such examination without objection are none the less admissible. Even if there were compulsions, not being of the kind which excludes a confession, then under the Evidence Act the fact of compulsion might affect the weight of the evidence but not its admissibility.

It is open to a Court to accept part of the story of one witness who is not reliable if it be corroborated by another who is reliable.

Appeal by the Insolvent.

Prosecution under the Presidency Towns Insolvency Act, section 103 (1).

The material facts appear from the judgment of

June, 6.

Rankin, J.:—In this case I have been trying an insolvent under special procedure applicable only to an insolvent by which a Bankrupty Judge has to take upon himself the duties of a Magistrate and to decide what is in all material particulars a criminal case to be treated as a criminal case. The prosecution has been in the hands of the Official Assignee and this Court has expended a great deal of time which is badly wanted with regard to other matters in trying out the accusations which are at present before me. I should like to say that I think this procedure is a very unhappy one. It would be infinitely better if the practice were that upon proper report being made by the Official Assignee, the Bankruptcy Judge should, if necessary, make an order for prosecution which should be carried out in the ordinary way and in the ordinary Courts. That is the practice in England and I hope it will be the practice in this country before long. There are many advantages in that, one being that in the ordinary course of criminal investigation, the prosecution can get more assistance and more trained assistance. The other is that in a proper case, the accused can in a presidency town be sent before a jury. The matters which I have been trying are matters which would be infinitely better tried before a jury; the jury would hear the evidence, they would hear what is alleged by counsel on both sides, the Judge would sum up to them; and the question whether suspicion has passed into proof, and the question of credibility between one witness and another would be left to them for their

decision without giving reasons. That course would have been specially preferable in this case because it is idle to shut one's eyes to the fact that the insolvent is not really the only person intimately concerned in the matter.

Before proceeding to give my reasons I should like to put on the record the facts with regard to Mr. Perkins. Construing as best I could, sections 103 and 104 of the Insolvency Act with the relevant sections of the Criminal Procedure Code, I made up my mind that the course most correct and fairest to the accused was to have the prosecution put all their witnesses in the box before I framed the charges; that the accused should be entitled to reserve all cross-examination until after the charges were framed, and should not even be called on to show cause against the framing of the charges until after he had heard all the evidence that was going to be given against him. Unfortunately owing to a fire having taken place in the business premises of Mr. Svamvur, Mr. Svamvur could not be brought to Calcutta for some days and in the meantime Mr. Perkins had to sail for England. I was not minded in the stress of these days to prevent, if I could prevent, Mr. Perkins from leaving by the boat which he had arranged to leave by. The result was that Mr. Perkin's evidence has had to be ruled out. So far as I am concerned I heard the evidence of Mr. Perkin's and I took it down nearly a month ago but from the moment it appeared that he would not be cross-examined, I have not looked at my note. I have done my best to forget it altogether and for all purposes Mr. Perkin's evidence is out of the case.

Now I will commence first by considering the position of this insolvent, as regards his method of business and his method of keeping accounts. The main book of accounts is a book which is partly a cash book and partly a ledger. When one comes to look at the cash part of it, one finds that there are no details as regards dates at all. It is obviously a very inartistic cash book and a very unsatisfactory cash book upon the view most favourable to the insolvent. As regards the ledger, that looks more satisfactory but the insolvent himself says that it was written up within the last two or three months. As regards the appearance of the book, from an Official Receiver's point of view, it undoubtedly looks suspicious but that matter is not directly before me, nor can I decide on it. The next thing is the insolvent says that he never kept any stock book at all. From the earliest moment of which I have any trace, both before and throughout this prosecution, the insolvent has always immediately and consistently denied that he ever kept anything corresponding

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to a stock book. This is in itself a somewhat curious circumstance if it be true, as the insolvent was trading in jewellery. There is a bill book, there is an approval and an inspection book, about which no comments have been made and which I think are in order. As regards another book which appears now with the first pages torn and with a series of entries on page 26, the prosecutions' case is that it was a sort of stock book: the insolvent's case is that he brought a lot of account books at one time chiefly at an auction that he used to tear off pages from time to time and used them as he happened to require. His case is that that page 26 was a copy of a invoices of Benzimra; that the previous pages had been torn off for casual purposes because he did not attribute much value to the book which he bought with a lot of others. Why these invoices of Benzimras should be copied and these only I have not had explained, but so far as regards an invoice copy book or a stock book there was practically nothing in existence according to the insolvent's case. As regards his cash book the insolvent's statement is that the diary (there were two diaries undoubtedly for 1918 and 1919) was his original cash book, that from these entries in the diary, there was what he calls, a rough cash book, which I gather to have been a bundle of papers; that the entries in Ext. B, the book which was produced, come from those two sources. Another book however was found upon the search. It now has pages torn off at the beginning and, as has been pointed out this morning, also pages torn off at the end; and the allegation of the prosecution is that pages at the beginning were inspected at the search on the 6th and were seen to contain entries such as would appear in a cash book, as distinct from a ledger, or daybook or any other sort of book. The insolvent's case is that this was another book from which pages were torn as required, that it was not kept and entered as a book of account at all. At the search another blank book of account was discovered: this one is in tact. I do not forget that the insolvent kept invoices and other papers and multifarious papers that have not been catalogued. Still looking only at the uncontested facts as to books, from the point of view of bankruptcy so far as book-keeping is concerned, the case starts with a very considerable deal of suspicion. The matter is not improved by the fact that in an action which the insolvent brought against a certain Rajah claiming to have sold him jewellery, with the exception of two bills, no documents material to the present purpose were disclosed, and in cross-examination the insolvent started off with an answer that he kept no books at all. Mr. Ghose has argued before me to-day that

if one considers the issue in the case, it is not impossible that the affidavit of documents disclosed all that was relevant to the issue; that the answer about keeping no books at all may have been intended not to be taken at the foot of the letter but as referring to the particular question whether he kept a book which showed his own purchases or his sales; hence that these matters ought not to tell against the insolvent. Though my first impression was very different, I am minded to agree with Mr. Ghose upon that point but if all the explanations be true which are required to explain the insolvent's evidence in cross-examination in that action, they certainly do not assist to negative what any sensible person must think obvious, that this man when he became insolvent did so with a very fishy set of books.

Now the adjudication order in this case was made on the 5th March. On the day before the adjudication order the insolvent had received a telegram from a firm or person called Babumull of Delhi from whom he had bought certain jewellery and it appears that he had paid part only of the full price of the jewellery and had given a post dated cheque for the balance which cheque had fallen due on the 4th March the cheque not having been honoured the insolvent got a telegram the effect of which was to say that unless it was met at once the case would be taken to Court for cheating. At the sametime there was pending against the insolvent a motion for arrest before judgment on the part of the creditor Benzimra and after certain adjournments on the 6th March the motion came on. By that time he had been adjudicated an insolvent and nothing more could be done. Some complaint was made before me that the adjournments were obtained by concealing from the Court the fact that he had for more than a week before contemplated making himself an insolvent. I am not inclined to pay any attention to that complaint as a matter of prejudice. However the matter may stand—and I say nothing to be little the extreme desirability of professional gentlemen being frank with the Court when asking for an adjournment—I cannot think it was supposed that any Judge on being told that a man was on the next day to be adjudicated an insolvent would make an order for his arrest before judgment, in order that it might take effect before adjudication; and, therefore, I am not disposed to pay any attention at all to that particular complaint.

On the 5th March two important incidents occurred in regard to which I confess I have no doubt at all. When a person is adjudicated an insolvent all his assets and in particular all his books of account vest in, and have to be taken charge of by the Official

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Assignee. This Court has for many years waged an unequal struggle with insolvent debtors, and for the last year or more it has been the rule as regards those debtors who come to be adjudicated on their own petition that before the adjudication order is made (in India I understand bankruptcy is regarded as a privilege) the debtor should go before the Official Assignee and be examined and make over to him all his books of account, and should get a slip from the Official Assignee to that effect which he may take to the Registrar. It is the practice and duty of the Registrar also to examine into the question whether the books of account have all been given up before the adjudication order is made. Now, that rule of this Court is not an Act of Parliament, and therefore one has to consider from a technical point of view somewhat carefully the effect of what may be done by an insolvent upon these occasions. For the moment I will pass that legal question by and I will examine the question simply in relation to the facts of this case. The Official Assignee says that when the insolvent was before him accompanied by his solicitor he asked him when he produced the book which I will call Ex. B, whether he had any other book, and he was told No, that the business was a small business, he did not keep a clerk, and so forth.

The evidence on the other side was given by Mr. Mandul, that the Official Assignee asked the insolvent whether he had any other cash book and was told No. At that time Mr. Mondal knew the position of the insolvent as regards his books; at any rate he knew that he kept a bill book, approval book, and such like. He had had the cash book, Ex. B. copied in his office and he says that he was intending at a later stage to make out a detailed list of books and hand them over to the Court. Now I think it is perfectly hopeless to suggest that when one book which was a cash book was produced before the Official Assignee whose daily duty is to deal with these matters and to ask all debtors whether they have discharged all the books of account which they ought to disgorge the Official Assignee would go and specially ask for another cash book when he has got one already and would omit to enquire for other books. It is incredible that the question, therefore, was any thing save what the Official Assignee says it was, "Have you got any other books" meaning books of account, and the insolvent with his attorney standing by his side answers that question in the negative and the Official Assignee gives the order for them to go to the Registrar stating that they had disclosed one book as having satisfied his requirements. The matter does not stop there; the parties go before the

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Registrar to make the adjudication order, and Mr. Remfry is the gentleman who really originated the suggestion that books of account should be obtained before a debtor is adjudicated on his own petition. There is no doubt from the evidence given by Mr. Remfry and the evidence given by Mr. Mandal himself, that the question was put in the insolvent's presence to Mr. Mandal, "Is this the only book of account?" Mr. Mandal tells me that he answered "Yes." What is the case made in defence of this? Let me consider it. Mr. Mandal's evidence is that although he knew there were these other books the bill book, the approval book and so on he regarded these books as not being the main book of account. There is a distinction he says between the main book and the subsidiary books which he calls "feeders" to the main book, and he states that he thought that at the time the adjudication order was being made only the main book was required. When a person is asked a plain question, is this the only book of account, it is idle to make a distinction and say "I divide the debtor's books of account into the main book, and subsidiary or feeder books." It is perfectly obvious that the intention of the Registrar before he made that adjudication order was not to allow the insolvent or his solicitor to make up their minds as to which was important and which was subsidiary, but to get all the books of account before making the adjudication order. If there was any doubt a frank statement would have solved it. The suggestion that the answer was made in good faith I reject absolutely and altogether. It is absurd to suppose that for purposes of the Insolvency Court the main book of account is the only thing that may be required. As a matter of fact the detailed accounts, the "subsidiary" books of account from which entries are posted into the main books of account are as important for every purpose of bankruptcy as the main book. Mr. Mandal suggests that the debtors have 30 days in which to file their schedule, and he thought in the course of those 30 days it would be time enough to produce the other books. The two things have nothing to do with one another: the main book of account is essential for the schedule just as the others are. The business of the insolvent is, (and every attorney knows it perfectly well) first of all when he is asked a plain question, to answer truly. Secondly, to give up from the start, if required, the books of account which are demanded. Throughout this case, I say it frankly, when I have been considering the conflict between the evidence of Mr Mandal and that of the Official Assignee I have not been able to prevent myself from remembering the way in which Mr. Mandal answered the perfectly plain, and in no sort of way

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ambiguous, question which was put to him by the Registrar. Anyhow on the 5th plain and common question is untruly answered twice.

Now, on the 5th another thing of importance to notice is this: on the occasion of going before the Official Assignee, certain jewellery which the insolvent had got from Babumull was handed over to the Official Assignee as part of the assets.

On the next day the creditor, Mr. Svamvur, a representative of Benjmra, found out that this man had been adjudicated, and he naturally enough went with his attorney to make enquiries as to the position of their debt. They go to the Official Assignee and they discover that this book has been put forward as the only book of account. They are not satisfied with this. Sometime in the middle of the day the Official Assignee orders a search to be made of the insolvent's room at the Grand Hotel to see whether he has any other books of account or assets or what not, and the Official Assignee considers that the search should take place in the presence of Mr. Mandal; so Mr. Svamvur, Mr. Arnfield, assistant to the Official Assignee, Mr. Perkins, solicitor of the creditor, and Mr. Mandal went to the insolvent's room at the Grand Hotel. They did not find him there. After waiting sometime Mr. Svamvur found him at lunch and brought him back to the room, and they were all admitted. In the course of that search undoubtedly a large number of books and papers were found to be in the room. As to what was found to be in the room one thing is absolutely clear, viz. that two diaries, one for 1918 and one for 1919, were then found. These two diaries appeared in the list which was taken by Mr. Mandal. Mr. Svamvur says that the book which now has writing only on page 26, (Ex. F) was up to that page full of entries with the exception of certain blank leaves in between different entries. He said he immediately remarked upon it to Mr. Perkins, and said that it was a stock book and the key to the position. Another book is a book, Ex. G, which Svamour says he looked at, and found to be a cash book, with a good many pages from the beginning filled up with entries. Mr. Mandal from the commencement of the search insisted on behalf of his client that as he had been threatened with prosecution by Babumull of Delhi certain telegrams and papers ought not to be taken away by the Official Assignee, and among these was a press copy letter boo k which contained copy of telegram sent by the insolvent on the 5th March, the same day as that on which he was adjudicated, in response to a telegram of the 4th, which I have already mentioned. Now, as regards that matter the first

thing that took place no doubt was a discussion about the list. Mr. Mandal says he wanted a detailed list; he wanted a detailed list which would not only show what books were taken away, but the number of pages that were entered therein. That is referred to by Mr. Svamvur as though Mr. Mandal was insisting upon taking a detailed schedule of every document. Mr. Perkins seems to have been a man of some sense because at his suggestion the proper thing was done, viz. a rough list was made out as best as could be done; then the documents were put into a box and taken under lock and key to the Official Assignee's office. Mr. Mandal's evidence is that he argued first of all the question of the principle of the list and when he found he would only get a rough list he took little or no further part in the proceedings until towards the end when he desired to make a list for himself. Mr. Mandal also says (I think it rather curious) that he insisted upon the box being sealed, but that is denied by Svamvur. Now, I have considered very carefully the evidence of what took place at the search, and I have come to the conclusion, and am absolutely satisfied, that the diary of 1918 was found at the search on the 6th and was missing at 11 o'clock the next morning. I am also absolutely satisfied that the pages prior to page 26 in Ex. F were also found at the search as Mr. Svamvur says, and that they were missing the next morning at 11 o'clock. As regards the cash book also I believe Mr. Svamvur but I prefer to deal with this when I have discussed the other incidents of this case.

Now, the next morning Mr. Svamvur came at 11 o'clock to examine the contents of the box. The Official Assignee says that he arranged with him to do so the night before after the box had come back to the Official Assignee's office. As to what happened at 11 o'clock there is little occasion to consider matters in dispute at all. Mr. Mandal admits that later on the same day he was told about the missing diary and the missing pages in the stock book. The evidence for the prosecution is that Mr. Svamvur discovered the diary and certain loose pages which I have not mentioned hitherto to be missing, that he told the Official Assignee and went off to get Mr. Perkins. He and Mr. Perkins, came back, and Mr. Perkins, the Official Assignee and Mr. Svamvur went into the matter, and discovered what was missing. I care nothing whether the diary was discovered absolutely at 11 o'clock or a few minutes later when Mr. Perkins was present; I care nothing whether the missing stock book was discovered before Mr. Perkins arrived that morning or after Mr. Perkins came in. There is no sort of reason to suggest

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if these documents in the box were tampered with that they were tampered with more than once. It is perfectly certain that at 11 o'clock the diary and as I think the pages from stock book too, were missing.

Now, I have to consider whether I am satisfied that on the morning of the 7th the insolvent himself was actively engaged in committing an offence under section 103 first of all with regard to these two books. According to the evidence for the accused, at 10 o'clock on the morning after the search, the insolvent arrived at the attorney's office and wanted the attorney to write a letter to the firm in Delhi which had sent him a telegram on the 4th, threatening to take him to Court for cheating. Mr. Mandal says he looked up Ex. H, the list of documents which he had made in the Hotel the previous day, to find the date of the wire in reply to this. The telegram receipt was put down as a "telegram receipt" without a date, and they wanted for the purposes of replying to know that date, as the date, so Mr. Mondal says, was essential. He says also that he would have liked to have a look at the wording of the telegram and that he was going to be busy at 10-30 before the Registrar as well as the whole of that day, and that was why he and the insolvent left the office and called at the Official Assignee's office at about 10-5. He says they went first of all to a waiting room next to the Official Assignee's room; that Mr. Mandal went along to Mr. Arnfield's room to ask Arnfield for inspection of the copy telegram which was in the press copy letter book, and that Arnfield refused to give it to him until he got the Official Assignee's permission. He says Arnfield suggested that they should wait for the Official Assignee to come; he would not be long; and they stayed there with Mr. Arnfield for some ten minutes or so when they were notified by the peon, who had been told to do so, of the Official Assignee's arrival. He says he went in and complained to the Official Assignee that he had been unable to get what he wanted without Official Assignee's permission; the Official Assignee said "Very well, I will give you my permission, so you will have your inspection." He says that thereupon he said "I can't take it now as I have got to appear before the Registrar"; in the result Perry was left to inspect this document and Mandal went to his appointment before the Registrar. That is the case for the accused.

Now the first thing one has, I think, to remember in this particular matter is this: that whatever dispute there is with regard to the stock book pages, there is absolutely no doubt with regard to the 1918 diary that it was in the box on the evening of the 6th, and

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that it was not there on the morning of the 7th at 11 o'clock. No doubt about that at all. Another thing there is no doubt about is that though Arnfield is not a party before me, upon the evidence which is given between the parties who are before me it is idle to suggest that Arnfield is not involved in the disappearance of that diary. It was given into his charge by way of special precaution to put into his tiffin room; he was given a key, and this book was absent the next morning. There has, therefore, been a loss of at any rate one book, and that loss must have been connived at by Arnfield.

The next thing that I have to consider is, what were Mandal and Perry doing at the Official Assignee's office at 10-5 on the morning of the 7th? This matter is complicated by a dispute as to whether there had been on the previous evening at about 5 o'clock an interview between Mandal and the Official Assignee. Mondal says that he saw the Official Assignee about this matter after the search towards 5 o'clock on the 6th; that he mentioned certain documents having reference to the Delhi case including the press copy letter book; that he asked the Official Assignee to let him have these documents, and that the Official Assignee had agreed provided that he would write a letter asking for them. There is a letter dated 6th March to that effect from Mandal's office, and it is perfectly clear that that letter was delivered by a peon and signed for in the peon book by one of the Official Assignee's clerks, not on the 6th, but on the 7th. The Official Assignee denies every thing with regard to that interview; he says that he took no notice of the date mentioned in the letter he did not notice that its statements were false and as a matter of fact he had forgotten all about the letter. Now the question is, what were Mandal and Perry doing at the Official Assignee's office at 10-5 the next morning, and upon that question I do not think that the dispute about the letter has any great materiality. I am inclined to think that the accused's case is distinctly worse with the letter and with the interview than without them. I am quite satisfied that for Arnfield to be at the office at the time that he was the next morning was an unusual circumstance. It was so unusual that the peon, Baman, who gave evidence before me and who, I think, was a distinctly honest witness, thought it so early for Arnfield that he looked at the clock to see whether he had gone wrong as regards his notion of time. The Official Assignee says that 10-30 was the hour for Mr. Arnfield to come to office just as it was the hour for himself to come. Not unnaturally the clerks when asked whether the Official Assignee or Arnfield came first give different

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answers. The bulk of the evidence appears to be that Arnfield usually came after the Official Assignee but I attach no importance to this general comparison of their habits. If both these gentlemen had the same time for presenting themselves at the office no doubt one would come before the other one day, and another day the position would be reversed, and clerks and peons would be apt to generalise from particular instances. I accept it from the Official Assignee who must know that in the ordinary course of things Arnfield's hour was 10-30. It has been said, and it is perfectly true, that there is a tradition which has got into the rules of the Court that the office hours of the Official Assignee are from 10 o'clock. In previous years this hour may have been observed by all the staff. Also I do not doubt that long before 10-30 peons, chaprassis and sweepers, to dust and clean, present themselves. It is in evidence that by 10-15 one of the clerks, the cashier, is in the habit of presenting himself. For the moment what I am concerned with is this: that on the morning on which papers were missing with Arnfield's connivance, Arnfield came to the office much before his usual time.

Now the next thing is, Is the fact of Mandal and Perry being there at 10-5 a circumstance which ought to be regarded as suspicious. It is not proved before me as facts in a criminal case should be proved that Mandal knew that there was never any chance of seeing the Official Assignee at his office before 10-30. Again 10 o'clock itself is not an extraordinary or very unusual hour for a person who wants to see another, to try and find out if he is there. But I do think that the story which Mr. Mandal gives as regards the cause of that visit is distinctly absurd. There had been this search the day before and one would have thought that when Perry arrived at Mandal's office at 10 o'clock these parties would have had something to discuss. I am told Mandal had not seen Perry over night. I am told that Perry started at once about replying to Delhi, that Ex. H was got out and that it was noticed that the date of the telegram which Perry had sent was not mentioned. Reading the evidence for the defence fairly it is at any rate alleged that one essential matter for which they went to the Official Assignee's office then and there (seeing Mandal was busy at 10-30 before the Registrar) was to get the date of that telegram. I am very sorry to say so but I have been also absolutely unable to convince myself that this story about the date of that telegram is any thing except an afterthought. The position is this:—on the 5th Perry had been adjudicated and had handed over his jewellery in the presence of his solicitor to the Official Assignee; and on that day he sent a tele-

gram to Babumull in reply to the threat of taking action against him for cheating contained in the telegram of the previous day. The telegram is as follows:—"Wire received—Refer my letter 13th instant—your goods delivered Court—Letter follows warn you against proceedings—serious consequence will follow if you take proceedings." Now it was put to Mr. Mandal whether he thought that that telegram was the sort of telegram that Perry himself could draw up and he accepted the suggestion that it looked as if it was drawn up by a lawyer, and he also accepted the suggestion that if it was drawn up by a lawyer, that lawyer must be himself. Although in his answers with regard to this matter, he went—just short of actually saying avowedly "Yes, I know I drafted that telegram for Perry," it is impossible to read those answers carefully as I have done, without seeing that it is perfectly clear that that telegram was drafted with Mr. Mandal's assistance. It is to be observed that the purport of the telegram was to assure the person at Delhi or at any rate to give him pause, by telling him that the goods had been delivered to Court. Mr. Mandal's evidence is that he originally intended to write the letter on the 6th, and as I understand his evidence, this letter would have been posted on the 6th but for the time occupied in the search. He wanted to put in that letter that the debt had been admitted in the insolvent's schedule or list of creditors and therefore everything was above board; that he had meant to file on the 6th but the search prevented him. Now I am told on the morning of the 7th at 10 o'clock the insolvent came about the important matter of the letter and that the insolvent did not recollect that he had sent his reply by telegram on the same day—two days before—on which he had been adjudicated and had handed up the jewellery, that Mandal did not recollect that he had drafted a reply on the same day as the adjudication order was made. That he did not recollect that he had intended to send this letter on the previous day and had been prevented by the search. That these two persons at 10 o'clock went over to the Official Assignee's office for the purpose of getting the date. I find it impossible to accept this story. So far as Perry is concerned, he presumably is not adjudicated every day, presumably he is not threatened with criminal proceedings every day, and how Perry could possibly doubt having sent that telegram on the 6th, two days before, I say, how he could have been in any doubt as to when he had sent it, passes my comprehension altogether. It is said about Mandal that he is a very busy man and undoubtedly he is. His letter book shows a great many letters written in it on the 5th. It is also true that this telegram appears

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to have been despatched not from Mr. Mandal's office but from the Grand Hotel. Mr. Mandal when he gave his assistance may very well have given it not meaning to charge Perry for it. Even so, it is quite incredible from the point of the answer "The goods have been deposited in Court"—that Mr Mandal did not recollect that it was sent after they had been deposited, so that the telegram could only have been sent on the 5th or 6th. Perry must have known all about it and the idea that either of these two persons took the trouble to walk across the street to find out whether the telegram was sent on the 5th or 6th, is a suggestion I reject *in toto*. The Official Assignee says that when he saw Mandal on the morning of the 7th he was told that he wanted a copy of a letter in the press copy letter book. I am not going to take it against the accused that what was asked for that morning is distinct from the copy of the telegram in the press copy letter book. I think there is nothing in that discrepancy at all. The Official Assignee says that what was asked for was a copy and one thing that makes the matter suspicious was the fact that Mandal had come ostensibly to ask for a copy but no copy was obtained in the end. Mr. Mandal says that he will not swear whether he asked for a copy or for inspection. What happened was, Mandal being pressed for time having to go to the Registrar's office, Perry was left to do what was required and according to the evidence for the defence what Perry brought back to his attorney was a slip of paper with the date of the telegram on it and Mr. Mandal says that he (Perry) told him the substance of the telegram. The idea that either of these two parties did not know the substance of the telegram I reject altogether and therefore I am bound to say that even if the natural desire of a solicitor is to see a document before doing anything else in the matter, the case for the defence about getting this essential date does add a very strong element of suspicion to an already suspicious case. Moreover there was nothing whatever essential about the exact date, nor indeed did it matter two pence to any body for any purpose. The reply would have been just as good without it, if it had said "Reference your wire of 4th and my reply thereto." According to Mandal, on the evening of the 6th the Official Assignee promised that these documents including the press copy letter book would be sent. If true, I do not think that has any effect except to make it rather less probable that these people immediately on Perry's arrival at his solicitor's office at 10 o'clock walked over to the Official Assignee's office. But inspite of the Official Assignee's failure to pay attention to the letter dated the 6th and the rash charge made by his

counsel at an early stage of the case, I do not think it is true. If these documents were promised the Official Assignee would not have forgotten it and the promise must have been a prominent topic in the conversation of next morning. It is difficult to see why they should not have been handed over then.

Now comes the question of other possible ways, in which on the morning of the 7th, these documents could have been lost. The suggestion has been made to me as part of the case of the accused that although it is not for him to show how the documents were lost or to accuse any other person, there was fraud on the part of Mr. Svamvur himself to get Perry into trouble out of spite against him. It was put to Mr. Svamvur in cross-examination that on a certain date a friend of his Mr. Dunlop, had come to his room and there were papers and diaries on the table (meaning of course Perry's papers, which we are considering) and that Mr. Svamvur told Mr. Dunlop that Perry would give a lot of money for those papers. This was put to Mr. Svamvur and denied by him. Mr. Dunlop was called and his evidence was to the effect that Svamvur was working at papers apparently in connection with Perry's case but he did not say anything, nor even hint at anything, which led him to suppose that he was intending to do anything unworthy, simply meaning that Perry would be very interested to know the result of his investigations. That attack broke down absolutely. Now I do not feel as regards that attack on Svamvur that the accused ought to be prejudiced by it, because I think it is quite possible that that extremely fatuous suggestion is the result of the silliness of Mr. Dunlop. But another suggestion was made about which I take a very different view. The suggestion was that on an uncertain date—only given, noticeably, as being after the examination under section 36 before the Registrar, Mr. Svamvur and the accused went together for a drive in a motor car, that in that car there were certain papers, and that Mr. Svamvur offered to get Perry out of his difficulties if he paid him a certain amount of money. I cannot say whether it was by way of making this story bear the semblance of truth or whether it was for some different reason but a slip of paper was put in in the handwriting of Mr. Svamvur which is to the effect that a lady was waiting in a car for Perry, a document which Svamvur says he sent up at the request of a lady whom both knew made to him as he was passing through the hotel. I do not know whether it is supposed that that slip had anything to do with the other incident, but in any case, what an extraordinary notion from the point of view of the defence. This man had been examined in the month of

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March about these missing documents, he is taken in the car in which were these documents, and this proposal is put to him. What a chance for him to stop the car, get the number, call the police or passers-by, go to his solicitor, explain to him every thing and write at once to the Official Assignee. It is a curious thing for him to do, to be journeying in a car with a creditor who was bringing these serious charges against him. Not a word of this until the trial. Not even the exact date yet. Then again it is stated that Svamvur was a disappointed creditor, that Svamvur was the man who had induced the Official Assignee to have a search made, that there is an animus on the part of Svamvur against the accused; therefore I must consider the possibility of Svamvur having done this. I see no animus on the part of Svamvur against the accused which was not quite commensurate or in keeping with the proper attitude of a creditor who wanted the Bankruptcy Court to do its duty by him as a creditor. Svamvur was interested in getting the dividend, in tracing assets, and it would be *pessimi exempli* (a) if this Court were to lay down that because he was exercising his patent rights to have the books of account taken possession of; to have matters properly thrashed out and traced in a case reeking with suspicion so far as the books are concerned, it ought to be imputed to him that he was prepared himself to get the debtor into trouble by committing a crime. Apart from that there are various other considerations. As I understand it was suggested that this might have been done immediately after the search because on the discrepancy among the witnesses as regards time, the box was rather longer than it should have been on the 6th, when it arrived at the Official Assignee's office. I can only say that Mr. Svamvur must be credited with great promptness if he suddenly and immediately made up his mind to commit this swindle when going away with the Official Assignee's assistant and Mr. Perkins, his solicitor. Arnfield as a matter of fact has, I know been suspended, and has got into trouble and difficulty over this matter; but there is not a suggestion that Svamvur has ever been impeached by Arnfield or rounded on by Arnfield, and Arnfield did ask the Official Assignee that this box should not be opened except in the presence of Svamvur. That was on the morning of the 7th. It was a most ridiculous suggestion and a most suspicious one—one which could only be mentioned at the time to shield himself and improbale if Svamvur was in league with him. Beyond all this there comes the most extraordinary fact of all. According to the debtor there were no pages torn off which

(a) Meaning "Of the worst example"—Rep.

had been part of Exhibit B. no pages prior to page 26 in the stock book and no pages in the cash book torn out since the search. Apart from the diary, I really do not understand what the papers were in the view of the defence that Svamvur is supposed to have offered on this journey in the motor car. For these reasons I am of opinion that Svamvur has done everything to show that he is *bona fide*, and that there is absolutely not a tittle of reason in the suggestion that he may be the culprit.

There is yet one reason more which seems to me to put the matter beyond argument, and that is this: Svamvur had looked into the book (Exhibit F) and noticed what entries it contained. Svamvur had not at the search so far as the evidence goes examined that diary. The diary was a book which might or might not be of importance from a business point of view. We know now, since the private examination under section 36, how important it was, but the importance of the diary as a book of account was not disclosed on the 6th; nor on the 7th because of course it was absent. On the 7th we know that the complaint before the Police Court was drawn up; the parties joining in it directly or indirectly were Perkins, Svamvur and the Official Assignee. Now that complaint mentions nothing about the diary at all, and at one part of this case it was suggested on the strength of this that the diary had never been discovered missing till after the 7th though Mr. Mondal's evidence in the end put that matter right. Just consider the position, to steal the diary on the 6th for the purpose of getting the insolvent into trouble, and yet not to complain about it on the 7th, and not to put it into the complaint by the Official Assignee. That fact alone shows, whoever stole the diary, it was certainly not stolen by Svamvur for the purpose of getting the insolvent into trouble. The one thing which was made much of in the complaint was the absence of the pages from the stock book. There is an incidental reference to the absence of the loose pages that are said to have come from Exhibit B. But the one point on which the insolvent was to be prosecuted then was the missing pages in the stock book. Perkins is a solicitor, Svamvur the creditor who had looked into it and called Perkin's attention to it on the previous day, the Official Assignee is prosecuting on the strength of their evidence. That fact to my mind puts all doubt aside as regards Svamvur's evidence about what he had noticed, about the conversation that there was when that book was found. He says he saw his own account; he says he looked it over; he said it was a stock book; he said it was the "key of the position"; but the debtor denied it was a stock book

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and preferred to call it an invoice copy book; that therefore was put down.

Now, then Svamvur being out of the way; Arnfield going before 10 o'clock to the Official Assignee's office; the accused and Mr. Mandal going there soon after 10. I come next to the direct evidence of what happened at the office. The direct evidence that matters is the evidence of two witnesses, one Baman and the other Harish. Those two witnesses speak to two different times of this visit. Baman speaks to the beginning of it, and Harish speaks, as I think, to the closing. Baman says that Arnfield came to the office at 9-45; he says Mandal came five minutes afterwards; that he was told by Mandal to fetch Perry; that he fetched Perry from near the Official Assignee's office; that Mandal and Perry went into Arnfield's room; that upon that Arnfield opened the tiffin room door, and he saw them go inside; that in two or three minutes Mandal came out of the tiffin room; that he went out, i.e. he went towards the left, either towards the lift or the Official Assignee's room. So far as that witness is concerned I have considered very carefully Mr. Das' arguments, not only the question whether he is an honest witness, but the question whether if what happened was as Mr. Mandal says, this witness could by mistaking times or by being rather stupid, misrepresent the facts into something different. I can imagine no reason for rejecting Baman's evidence on the ground of honesty. He appeared to me to be a particularly straightforward witness of his particular class. He made no effort to do anything in the witness box except honestly to recall what took place. I do not think he could possibly be accused of letting his imagination get mixed up with his memory, and so far as he is concerned there is not any suggestion that his evidence is at all in contradiction of the evidence he gave on that very day when the Official Assignee held the enquiry.

As regards the other witness, Harish, I am bound to say that his evidence is not nearly so good. The statement that he made on that day was that he came that day at 10-20 to 10-30; that he saw Arnfield in front of the tiffin room door, and that he saw Mandal and Perry inside. It does not appear that he was asked what they were doing inside though it is very difficult to suppose he was not asked that question, but no answer as regards that appears in his statement before the Official Assignee. In his examination-in-chief here he adds that they were handling papers, and in his cross-examination he adds the statement that they were kneeling down apparently looking at something on the floor.

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An attempt was being made to show that Harish and his family were on terms of enmity with Mandal about a matter which arose some 10 years ago. I do not pay any attention to that at all, and think that broke down altogether; but I do pay attention to the fact that the statement first made by this witness differs from the full statement that he makes in cross-examination by the absence of certain very important statements, and so far as I am concerned I would be slow to act upon the evidence of Harish if it stood alone. On the other hand I am prepared to act upon the evidence of Baman, and I do think that the original statement of Harish made very shortly after the event was in all probability perfectly true.

Now, the case for the defence is—and indeed it must be that Mandal and Perry, never were in the tiffin room at all at that time in the morning. In addition to the fact that their case on that is untrue, if Baman's evidence is correct, there is of course no honest reason which they possibly have for being taken into the tiffin room of Arnfield at that time of the morning, where the box lay which contained the documents which had been seized from Perry. In view of the undoubted fact that documents were missing as in the case of the diary; in view of the undoubted fact that Arnfield came to the office that morning especially early for some special purpose; in view of the fact that the story for the defence as to the occasion for going to the office on that morning breaks down altogether so far as Mandal and Perry are concerned I find that the prosecution in this case have established beyond reasonable doubt that these documents were taken and tampered with by Perry.

I will, however, consider one further matter upon which a good deal of argument was addressed to me. In a matter of this sort the consideration is obvious, that the person interested in suppressing documents is the accused and no one else. On that Mr. Das argues and so far as I am concerned, very forcibly, in this way. He says if you are going to look at Perry with suspicion and to act upon the assumption that his was the interest to do away with these documents, there should be some tangible ground for knowing that it was his interest to remove these documents. I quite approve of that. It is only *prima facie* in the interest of the insolvent to have his documents removed. If he is an honest insolvent it may be very much against it, if he is a dishonest insolvent even then it may not be to his interest to add a question about the disappearance of papers to other charges. Therefore I do think that Mr. Das is right, and that this Court ought to consider whether there is any tangible evidence to say that the disappearance of these documents would

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be to Perry's interest. Now so far as Perry is concerned there can, I think, be no doubt at all in view of the examination under section 36, that in the absence of that diary, any investigation of his affairs whether for the purpose of tracing assets or any other purpose, is paralysed and very nearly impossible.

As regards the stock book, the argument that was addressed to me for the defence is this; "We have one page of the stock book which is really only a copy of two invoices, and if it may be assumed that the other pages contained nothing more, then until it is shown that invoices themselves, which, or many of which, are in the box, do not give that very information, there would not be any point in destroying those papers. Well, no doubt if the pages that are now missing are mere copies, and nothing more, of invoices, all of which are in the box, there would be not much point in taking away the document. But were the pages mere copies? An invoice copy book is a record of stock as it is bought, taken in the convenient form of the supplier's invoice. As stock comes in, it can be taken into the book in that way, and if there is nothing more than a mere copy of an invoice, one would not call it a stock book, but if that is made the basis of further memoranda it is quite possible to convert an invoice copy book into a book which is in the nature of a stock book. I am perfectly satisfied that this book, Exhibit F, was not a stock book in the least degree like the book that was put forward by one of the witnesses for the defence, when he produced a very large volume with columns for the most minute details with regard to every item of stock; a book that would rejoice the heart of an accountant to see the detail and care with which it was kept. There is no suggestion that this insolvent ever kept a book so artistic as that. A stock book may be kept in all sorts of ways, and it may not be called a stock book. From the basis of an invoice copy book if memoranda are made as to how the things coming in in that way have been dealt with, it is quite possible to trace *e. g.*, what stock would be in hand. Now, that is exactly how the book struck Svamvur when he looked at it. He says it was a stock book. Pressed he says he saw entries in it, red ink and so on. It seems to me that when a business man like Svamvur who looked at the book and showed it to Perkins, was immediately impressed by the use of that book, what he says at the time is almost certain to be right. Perry, like other jewellers, could not carry on his business if he was wholly and always without the kind of information that ordinarily and properly is kept in a book that is called the stock book. Probably no accountant would have been satisfied with this book as being

a model or proper stock book." I think it was a compromise and contained such memoranda on the basis of the invoices as would serve him in the place of a stock book in so far as he needed one or was minded to keep one. One thing is plain: the most painstaking examination of the invoices in the box, having nothing with which to compare them, will produce no result either as showing or as negativing the insolvent's interest to suppress these pages. On the existing materials now, no possible way of checking what stock the insolvent ought to have on hand can be or has been suggested.

There are various other matters but I do not think any useful purpose would be served by my going into them. There is of course the meeting or meetings that took place with Mandal and the Official Assignee on the 7th; there is the controversy as to that, between what persons and in what sequence the different things happened. The Official Assignee says that he told Mandal and the insolvent that they came and asked for a copy of something and took no copy; he says he was told "Oh, I only wanted the date." The evidence of Mandal is different as regards that. One point is worth observing, and that is that apparently when challenged as to what had taken place in the morning Mandal told that Official Assignee that he had been present with Perry the whole time, but on the Official Assignee saying that he had evidence to the contrary, Mandal, without withdrawing his statement, said that perhaps he might; that it was difficult to remember or something to that effect. I find it very difficult to realise why Mr. Mandal on the afternoon of the same day, if what had happened was what he says should have wavered or even hesitated upon so simple a point as that. I cannot help thinking that that corroborates in a material particular the evidence that is given by the witness Baman and although these small points are not to be strained this is one which, among others ought I think not to be overlooked.

So far as regards the Cash Book (i.e Ex. G) I do not think that in a criminal case sufficient attention has been paid by the prosecution to get up their case with regard to that matter. It was omitted under section 36 and I am not going to hit the insolvent on any charges relating to that exhibit.

With regard to the first charge which refers to what took place on the 5th, withholding the production of the following books: the diary, the Stock or Invoice Copy Book, Bill book and Bank Pass Book I have thought from the first that the surrounding circumstances (as regards the other charges) would on the question of intent make a difference to the result. I do not think it any defence for an

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insolvent to say that his solicitor took the responsibility upon himself though I shall take it into account on the question of sentence. The intent being present I think that section 103 applies: production withheld when demanded just before adjudication is I think covered by the section just as destruction before adjudication would be covered.

As regards the stock book it does not seem to me to matter which of the three charges is chosen because on the facts of this case I think all three are open, but I propose to convict on the charge 2 a (wilfully preventing the production of pages 5—22 of his stock book) and also 2c, viz: destroying the stock book by removing the pages.

So far as the diary is concerned I propose to convict him of wilfully preventing the production of the diary.

On these charges I am going to give counsel for the accused a chance to make any representation he may want to make as regards the question of sentence.

Mr. Ghose (for the insolvent). My client says he wishes to consult Mr. Das.

The Court: You must go on Mr. Ghose.

Mr. Ghose does not want to add anything upon the findings.

The Court: I have all the facts before me. On the first charge, I merely make an order for ordinary imprisonment for seven days.

As regards the other charges (wilfully preventing the production of the stock book; destroying the stock book by removing the pages, and wilfully preventing the production of the diary), I sentence the accused to 12 months imprisonment to run concurrently upon each of these three charges, i. e. simple imprisonment and not rigorous.

Mr. Ghose: Does your Lordship intend that the sentence of charge should be separate from the charge.

The Court: All the sentences run concurrently.

Mr. Chaudhuri (for the official assignee). There is an entry against the charges that he is found guilty.

The Court: Yes.

Against this decision, the insolvent appealed.

Messrs. Gibbons (*Advocate General*), *C. R. Das*, *B. K. Ghose* and *A. K. Deb* for the Appellant.

Messrs. Gregory and *K. N Chaudhuri* for the Respondent.

Woodroffe, J.—The insolvent is charged under section 103A (1) of the Presidency Towns Insolvency (III of 1909) Act with four offences. I deal now only with the charges upon which he has been

convicted and which are the subject of appeal. These charges are (1) that the appellant on the 5th March 1919 fraudulently and with intent to conceal the state of his affairs and to defeat the objects of the Act purposely withheld the production of his diary for the years 1918 and 1919 and his stock or invoice book; (2) that he fraudulently with intent to conceal the state of his affairs and to defeat the objects of the said Act on the 7th March wilfully prevented the production of pages 5—22 of his stock book by removing or causing to be removed the said pages from the said book, the said pages and book relating to such of his affairs as are subject to investigation under the said Act; (3) that he fraudulently and with intent to conceal the state of his affairs and to defeat the objects of the said Act, on the 7th March destroyed his said stock book by removing or causing to be removed therefrom the said pages relating to such of his affairs as are subject to investigation; and lastly (4) that he fraudulently with intent to conceal the state of his affairs and to defeat the objects of the said Act on the 7th March 1919 wilfully prevented the production of his diary for 1918 relating to such of his affairs as are subject to investigation under the said Act.

A number of objections have been raised as regards the form and nature of these charges and to the formal findings thereon.

It was argued that section 103 does not contain words as the Provincial Act does (section 43) shewing that the offences there mentioned may be committed before or after the adjudication. I may say at once that I think there is no substance in this point. But then it is said that the books the subject of charges (2) and (4) were produced and taken possession of by the Official Assignee on the 6th March and therefore it cannot be said that the insolvent prevented their production. The actual prevention is said to have been effected by removing the said pages of the stock book and, apparently, stealing the diary on the following day the 7th March at the Official Assignee's office after possession made over to the Official Assignee. Charge (3) is also, it is said, bad because the destruction there mentioned is a form of prevention or withholding, the words being "destroyed or otherwise wilfully prevented." It is therefore said that the destruction referred to in the section is destruction before the document has been produced before the Official Assignee and not to alleged destruction (as here said to have taken place) in the Official Assignee's office after he had taken possession of the books. It is said that these acts may constitute the offences of mischief and theft under the Penal Code but are not specific insolvency offences. If the books were in fact produced having

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been taken possession of by the Official Assignee it cannot, it is urged, be said that they were withheld from the Official Assignee or that their production was wilfully prevented. I am not prepared to uphold this construction of the section. In this case, it is to be observed there was an alleged withholding on the 5th March and the books were never produced by the insolvent but were seized upon on search by the Official Assignee. It would not I think be reasonable to hold that if books were withheld on the 5th, and were taken possession of by the Assignee on the 6th at a search and were made away with by the insolvent in the office of the Official Assignee before the latter even saw them, that no offence was committed under the Act. Moreover objection which may have some force as regards the word "Withhold" are without them as regards the word "Destroy."

It was then argued that charges (1) and (3) were not in accordance with the notice and it has been held by Jenkins C. J. and myself in *Lucas* v. *Official Assignee* (Appeal 20A of 1914, decided on 9th June 1914) that a charge not framed in pursuance of the notice cannot be maintained. We must however, I think, read this statement, if not actually subject to the provisions of section 537 of the Code, then subject to the principle which is embodied in that section namely that no error or irregularity in a charge will call for a reversal of an order unless it in fact has occasioned a failure of justice and in determining whether this is so the Court shall have regard to the fact whether the objection could, and should have been, raised in an earlier stage of the proceedings.

No objection was taken to any of the charges at the trial. It cannot be contended reasonably that we should not act on a principle governing the trial of cases in the criminal jurisdiction proper. Here it is objected that the notice as regards the first charge runs "Wilfully withheld" whilst the charge runs "Purposely withheld." It is obvious that a triviality of this kind does not count. 'Wilfully' and 'Purposely' have the same or approximately the same sense. This objection fails.

It was at first objected that the notice states the intention alternatively by the word "Or" and the charge cumulatively by the word "And". This objection refers to several of the charges but there is no substance in it and it was subsequently withdrawn. If an accused receives notice that the prosecution may seek to prove against him either of two alternative intentions he cannot, as he must be ready to meet a charge in respect to both, be prejudiced by a charge of having had both intentions. The intentions men-

tioned in the Act are "To conceal the state of the insolvent's affairs" or "To defeat the objects of the Act." Concealing is doubtless a form of defeating the object of the Act and therefore the second intention must refer to other modes of defeating the Act. There is nothing to prevent an accused having had both intentions. He might wish to conceal the state of his affairs and also have some other object within the definition of the second intention. If it were the fact that the allegation of the second intention called for particulars we must take it there was no need for them here, as they were not asked for and no objection was taken.

The objection therefore that the charges are not in conformity with the notice is not substantiated.

But then a more serious objection is taken, it being said that no notice was given as regards charges (2) and (4). I think it is generally necessary that the insolvent should have notice of the charge which it is proposed to make against him. The notice does not contain anything about preventing the production of the stock book which is the subject of the 2nd charge and the reference to the diary in the notice (clause G) runs "Surreptitiously and dishonestly removed or caused to be removed from the custody of the Official Assignee your diary for 1918". The terms of this offence are not those mentioned in section 103, though there is a reference to removal in section 43 of the Provincial Insolvency Act; but removing a document is a mode of preventing its production and I think therefore that the notice was sufficient. As regards the second charge as there was no notice at all I should have been disposed to hold that it was bad were it not that no objection was taken to any of the charges and the accused could not have been prejudiced for the act charged by charge 2 is practically the offence charged in charge 3 in different language, and of this latter charge the insolvent had full notice.

It was then argued on the strength of the decision in *Re Lucas* (1) that the charges (2) and (3) are inconsistent or that at any rate the prosecution must state on which charge they ask a conviction and that there cannot be a conviction on both charges. For the case cited holds that to establish that books are purposely withheld it must be shewn that they exist, for preventing presupposes existence. It is to be observed that the act charged in charge (2) is the same act as is charged in charge (3) for the prevention of production is by removing the pages 5—22 and the destruction is by removing the same pages and the acts charged took place at one and

(1) (1914) Unreported. Appeal No. 80A of 1914.

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the same time and were one alleged event. I am somewhat doubtful therefore whether the accused could be convicted and sentenced under both charges (2) and (3). It is not necessary however to decide the point because Mr. Gregory has said that in the event of there being any doubt in the matter he would elect to proceed under charge 3. The point moreover has no practical interest because if the insolvent is acquitted under charge (2) he must be acquitted under the circumstances of this case under charge (3).

The result then is that the charges stand except the second which, to avoid an unnecessary discussion, is withdrawn because a conviction on charge (3) would be sufficient and an acquittal on that charge carries with it an acquittal under charge (2). It was then said that the judgment was defective because there is no finding as to the intent with which the accused committed the acts of which he has been convicted: *R* v. *Ingham* (1). It is to be observed that that decision is a Jury case. I am not prepared to hold that this Court with all the materials before it, could not, in appeal, make a finding of the intent if this had been omitted *per incuriam* by the Judge. But I am not satisfied that the judgment is so defective in this respect as that it cannot stand, though it would have been better if the finding were more specific. The learned Judge had obviously the question of intent in his mind and expressly mentioned it as regards the first charge and I think he meant to find the intention which is involved in his convicting the accused on this and the other charges. In that conviction is implied a finding of the intention with which he has been charged. I hold that this ground fails.

The 3and ground of appeal submits that the examination of the insolvent should not have been admitted and that therefore the judgment proceeds upon what is not legal evidence. The insolvent was examined apparently under section 36 of the Act. It was contended that the insolvent could not have been examined under this section, and that under English law admissions obtained under compulsion are only evidence "against a party" if the compulsion was legal, but not if it was illegal and a number of decisions of the English Courts have been cited to us as they were also referred to in the judgment under appeal. It seems that there is a practice to examine the insolvent under section 36. It is doubtful however whether this is provided for by that section. Under clause (1) the Court may summon the insolvent or other person there mentioned. The words "Any person" in clause (2) appear to refer to the same words in clause (1). Such person may be brought up for examina-

(1) (1859) 29 L. J. (M. C.) 18.

tion. But this can hardly be the insolvent seeing that the person summoned must be tendered a reasonable sum. Clauses 3, 4, 5 refer to persons other than the insolvent. Apparently section 27 which provides for the examination of the insolvent could not be held. Mr. Gregory suggests that though the examination was nominally held under section 36 it was justified under the provisions of section 33 which compel an insolvent to submit to such examination as may be required by the Official Assignee or may be directed by the Court. It is to be noted that the examination of the accused was held without objection from him and was therefore voluntarily made just, as it has been held as regards witnesses that section 132 of the Evidence Act makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only. We are however in my opinion not concerned with the English decisions cited, nor with the principle that an accused is not called on to incriminate himself. There is no question of that here. In this trial he has not been called on to say anything. What has been done is to put in evidence against him, something said by him in other proceedings in the insolvency.

These statements are relied on as admissions of fact. There is no doubt that the answers given by the insolvent now accused on the former proceedings are admissions under section 17 of the Evidence Act. Being so, they are relevant and admissible unless they are excluded by sections 18-31 of the same Act. None of these sections exclude the evidence. On the contrary section 29 states that even a confession (and not merely a mere admission as here) otherwise relevant does not become irrelevant merely because it was made in answer to questions which the party need not have answered. Even therefore assuming (which I do not decide) that the examination of the insolvent was not authorised, the answers given on such examination without objection are none the less admissible. Even if there were compulsion not being of the kind which excludes a confession (such as the illegal compulsion suggested), then under the Evidence Act the fact of compulsion might affect the weight of the evidence but not its admissibility. Apart however from this I am not satisfied that the Court had not power to examine the insolvent even if section 36 were not applicable and that there were any illegal compulsion. It is obvious that the Court must have full control of the insolvent. Nextly there being no objection to the examination there was no compulsion in fact but voluntary answers, and lastly even if there were illegal compulsion this would not under Indian law

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affect the relevancy and admissibility of evidence though it might in particular cases affect the weight of the evidence. I therefore overrule the objection and hold that the examination of the insolvent which was purported to be taken under section 36 is admissible, and we have accordingly referred to it. It is chiefly relevant as shewing that the accused kept an account of his dealings in his diary, that it was used in such a way as to be a book of account and for the admissions which it contains that if the missing diary were available it would afford evidence of transactions which might not otherwise be had. I now proceed to the case upon the merits. At the beginning I may point out that it is admitted that if the other and more serious charges fail, it is not contended that there can be a conviction on charge (1). The learned Judge has said that the acts and conduct on the 5th March that might in an ordinary case have an innocent appearance take on a very different appearance if the other charges are established. It has been contended that *mens rea* as regards the events of the 5th March cannot be inferred from the subsequent facts. On the other hand it may be replied that if in cases this be so, all the acts charged may be taken to be part of one common design, which is again contested. But as I have said even upon the view taken by the learned Judge the first charge fails if the others fail and it is therefore to them that we must first look. Moreover I think that if the evidence shews that the insolvent was *bona fide* acting under the advice of his solicitor as to what books were necessary to be produced the fraudulent intent mentioned in the notice is negatived.

I will deal then with charges (3) and (4).

The case for the prosecution is that Mr. Mandal the insolvent's solicitor was aiding and abetting his client in the commission of these offences and that three persons were in conspiracy viz., the insolvent, one Arnfield, the Official Assignee's Assistant now dismissed and Mr. Mandal. It might have been possible to have so put forward the case that Mr. Mandal was not necessarily involved, for it might have been argued that the insolvent had an interest to make away with the diary and possibly also to tamper with Exhibit F and that he had an opportunity to do so first when he was with Arnfield before the Assignee came to office, and after Mr. Mandal had, according to the witness Bamdeo, left the room of Arnfield and secondly when he was with Arnfield after the arrival of the Assignee when Mr. Mandal was admittedly absent. But reliance has not been placed on the second opportunity (if it was one) nor evidence given directly with reference thereto, and as

regards the first opportunity the witness Harish Dey going beyond his written statement to the Assignee gives evidence that Mr. Mandal was seen by him handling the papers. Though this does not necessarily carry with it an inference of guilt, for such inspection might have been (so far as the prosecution case was concerned) with the leave of Arnfield it was in fact relied on as an incident showing complicity.

I think therefore that the Advocate-General was right when he said that the case of Perry and his solicitor must stand or fall together and therefore that anything which renders the case as against Mr. Mandal improbable, weakens the case against the insolvent. Mr. Gregory admits that the case made and the evidence given was, that the offences charged were so charged to have taken place before the arrival of the Official Assignee when according to the prosecution evidence Mr. Mandal and his client were in Mr. Arnfield's tiffin room. The case therefore against the insolvent will be weakened by anything which is shown which indicates that Mr. Mandal was not involved. Not only this, for to the extent that Mr. Mandal is freed from suspicion, to that extent he becomes a reliable witness as to what actually occurred unless on the face of the evidence it is unacceptable.

At the outset it is to be observed that whilst it is easy to speculate as to the motives of the insolvent and Arnfield I am unable to imagine why Mr. Mandal should have, as alleged, implicated himself in this affair. He is a solicitor. He must know that to do what is here charged might result in his being struck off the rolls and convicted of a grave offence. And for what was he undertaking this risk? After all people who take such grave risks must do so in the hope of some good to themselves. Mr. Gregory was unable to say what this good might be. This is not a case in which so far as I can see there is any money. On the contrary the complaint is that there is so little. The insolvent is a man of no substance who has been hawking about for sale the jewellery of others—some of it obtained on credit—until a short time before his insolvency he was an entire stranger to Mr. Mandal. All that Mr. Gregory could suggest was that the solicitor was too zealous on his client's behalf and had been thus led away to tamper and make away with documents and perjure himself—an explanation I cannot accept as sufficient. I am wholly unable to accept such as an explanation in this case where (so far as the record is concerned) there is no suggestion which shews that the solicitor in question has any but a good reputation, where until the insolvency proceedings he was a stranger

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to the insolvent, and where no advantage to him pecuniary or otherwise is suggested in return for the risk incurred by him in aiding and abetting offences of a criminal character under the Insolvency Act and in return for his bolstering up such conduct by perjury on the trial of such alleged offences.

Whilst however there is nothing to shew why the insolvent's solicitor should make himself a party to the commission of these offences we must see whether the evidence offered is sufficient to prove that he did so. Not of course that the solicitor is on his trial; for the issue is as to the insolvent's guilt, but as part of the case which is made against the latter. It has not been made at all clear when the conspiracy was entered into, and a criminal intention first entertained by Mr. Mandal. Some of the evidence and argument would go to shew that the two the solicitor and client—were both in it from the first. On the other hand Mr. Gregory when pressed to explain certain incidents, put forward the theory that Mr. Mandal had no criminal design until after the search when he wrote the letter of the 6th March to the Official Assignee. If this be so then there are certain objections to the earlier part of the case which are unanswered.

It is thus said that on the 5th March they—insolvent and his solicitor—saw the Official Assignee together. Mr. Falkner says that he asked "Have you brought your books" when a book (Exhibit B) was produced which is said to be both cash and ledger. In examination before the Registrar the latter asked the insolvent whether he (the former) did not say "Is this your only book." In his evidence however taken later, Mr. Remfry says he asked whether this book was the only book of account and he understood from Mr. Mandal that that was so. Mr. Mandal also says (and in this he agrees with Mr. Remfry) that the latter seeing the receipt for exhibit B asked him "Is that the only account book. On which he Mr. Mandal said "Yes." As regards the interview he says the Official Assignee asked (and in this he disagrees with the latter)—"Is this the only cash book" on which the insolvent said "Cash and ledger combined." Mr. Mandal says that he could not have said that Ex. B was the only book because he knew that there were others, though he had not seen them. Rightly or wrongly he believed that it was only necessary to put in the main book and not the other books, which it is contended are not strictly books of account though ancillary thereto. There is no doubt that that only one book Ex. B was at first produced. The dispute turns on the question whether the insolvent or Mr. Mandal (it matters not which for they were present

together) said it was the only book the insolvent had or the only book of account. No one of course suggests that either Mr. Falkner or Mr. Remfry were telling other than what they believed to be true. The question is one of recollection and seeing that at the trial Mr. Remfry says the question was as to the book of account and Mr. Mondal says so also, and as Mr. Falkner is not certain of the exact words used or who said them, I do not think that this part of the case standing by itself has been made out.

But whatever the words used, whether book, or book of account, the Official Assignee directed a search at the instance of the creditor Mr. Svamvar and his solicitor Mr. Perkins. Then at the Grand Hotel where the insolvent was staying other books were certainly found, which related to his business, whether they can be technically called books of account or not, and whether Mr. Mandal was right or wrong in supposing that they need not be handed in at the first instance but later on. Of course the point is made that if the insolvent had been minded to destroy any of the books he would have done so whilst they were in his possession before the search. It is suggested in reply that he might not have known that there was going to be a search. In that case if his solicitor was aiding and abetting him as alleged he might have warned his client either before the search was ordered, or possibly afterwards to get rid of what was against him in his books. According to the evidence of Mr. Svamvar he found Mr. Mandal and Mr. Svamvar in earnest private conversation before the search, suggesting that something was being got up there. It would have been possible then to have delayed the search and communicated with the insolvent. But it is not suggested that this was done. The search took place without objection. Mr. Mandal wanted a list to be made and in fact prepared one himself. It would on the hypothesis of fraud have been more useful if the books had been bundled into a box without any list whatever, Mr. Mandal's list is in fact correct and would on any abstraction of the documents shew what had been taken. In fact he sent a copy of this true list to the Official Assignee after the time when he is alleged to have been a party to the abstraction of the diary for 1918. This is not the conduct of a guilty man. There is no doubt that two diaries were found on the search as also that one diary is now missing. According to Mr. Svamvar Exhibit F, the alleged stock book, but which was said to be an invoice book had pages in it with writing, which have since been torn out. It is a curious fact that if this be so, the only page which was left was a page showing goods supplied by Mr. Svamvar's firm. Why

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this was not also torn one is not clear, unless it be that it was an oversight. It is suggested that this was because the word "sold" appeared on other pages. But why it may be asked leave anything at all seeing that the evidence of Mr. Svamvar the creditor as to what was said about the book at the search is denied. It must be noted also that the book contains 425 pages. Of these pages 1—4 are in existence and blank. Pages 5-22 are missing—23, 24, 25 are in existence and blank and 26 only has some writing on it which happens to relate to Mr. Svamvar's goods. The remaining pages are blank.

According to Mr. Svamvar when Exhibit F was found he said "This is one of the principal things we want. It is the key to the situation. It is just the book we want, shewing the stuff which he should have on hand." When asked whether it was written up he replied "Absolutely full" at least up to a certain page and at page 26 there was his own firm's stock purchased by the insolvent on the 1st October. He says he shewed that page to Mr. Perkins. The latter's examination is not before us as he left before cross-examination, but as regards this particular page there is no dispute because it is still curiously enough in the book. According to Mr. Svamvar other invoices were copied in Exhibit F. It is to be noted here that there are a number of invoices and if these were those copied in F then if F were destroyed the materials from which F was supposed to have been made is available. When asked whether he examined the diary for 1918 the witness Mr. Svamvar said "We had no time to examine the books. I just looked through it. I took charge of it." Mr. Mandal on the other hand denies that there was any discussion about Exhibit F. When asked whether any observation was made by any one when that book was found he replied "None whatever." It is said that Mandal did contradict Mr. Svamvar as to the latter's statement as to the contents of Exhibit F and that he knew himself from before what they were. But his evidence which I accept is that he had not previously seen the book and at the search he did not examine it.

On the other hand it is a circumstance in favour of Mr. Svamvar's evidence that he told the Official Assignee that he had brought the stock book (which properly speaking it was not, judging from present contents) for it may be said he would not have done this if it contained one page only. The evidence therefore as to the supposed contents of the book other than the page now existing is contradictory. Whether Exhibit F contained the pages which have been it is said torn out, depends on Mr. Svamvar's evidence alone. Without

impeaching the truth of that evidence it would not therefore be safe to convict the accused in a matter of oath against oath unless it were shewn that there was good reason to believe that Mr. Mandal was a party to the alleged offences and that his evidence was on this or other grounds untrustworthy.

As regards however the diary the case stands on a different footing, for it is common ground that two diaries were in fact found at the search, that they were taken in a locked box to the Official Assignee's office and that the box was in Arnfield's keeping, and there is no doubt that one diary is now missing. The case therefore now resolves itself into this—has it been shewn that the insolvent abstracted or was a party to the abstraction of this diary from the box of the Official Assignee which was in the keeping of his assistant Arnfield.

There is no question but that Arnfield is *prima facie* responsible. For the diary was in a box in his keeping, the key was with him and the box was kept in his tiffin room. No one therefore could have made away with that document except Arnfield aided and abetted that act. At least that is the conclusion on the evidence before us though of course Arnfield's guilt is not directly in question. It is only relevant so far as it bears on the charge against Perry. It may also I think be said on the evidence that the insolvent may have had an interest in getting rid of the diary. But the question is did he in fact give reality to that interest by actually abstracting the book? Has that been proved clearly and beyond all doubt? The first suggestion made is that Mr. Mandal put forward a pretence for the purpose of getting access to the box. Mr. Mandal says he saw the Official Assignee at about 4/45 on the 6th March after the search, when he explained to him that certain documents found on the search were relevant for the insolvent's defence against a criminal charge, which one of his creditors was making from Delhi, but that the documents were not required for the administration of the insolvent's estate. He says that the Official Assignee agreed to make over the documents on Mr. Mandal writing to him on the subject, on which he Mr. Mandal went back and wrote the Official Assignee a letter on the 6th March. This is Exhibit 1. The letter commences "With reference to my interview with you this afternoon." Mr. Falkner denies having had any such interview and in fact Mr. Avetoon appearing for the Official Assignee on the trial actually charged that the letter was a fabrication but subsequently withdrew this charge, as he stated that he was instructed that the letter of the 6th March had been received, and in fact it bears Mr.

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Falkner's initials. The suggestion however now is that the letter was written for the purpose of making evidence that is for the purpose of explaining Mr. Mandal's presence with the insolvent at the office of the Assignee on the 7th March. Mr Mandal says he did not get the documents. On the 7th therefore he went to the Official Assignee's office a few minutes after 10 A.M.. As Mr. Falkner had not arrived he went into Arnfield's office and asked for inspection of the press copy letter book, but Arnfield refused this without the permission of the Official Assignee. Mr. Arnfield however said that the Assignee would come shortly and Mr. Mandal and his client sat in Arnfield's office until news was given of the arrival of Mr. Falkner about a quarter of an hour later. Mr. Mandal and his client then saw the Assignee when the former explained his business and the Assignee gave directions that Arnfield should give inspection to Perry. Mr. Mandal however himself went away as he had business in Court. Apparently Mr. Perry then went and saw Arnfield. Mr. Falkner says that though the insolvent and his solicitor when they saw him on the 7th asked for a copy of a letter from the Press copy letter book for the purpose of the criminal charge yet that no copy was taken that day or any other day, and that when he pointed out that to Mr. Mandal he explained that he only wanted the date. After the insolvent had seen Arnfield the creditor Mr. Svamvar arrived and on inspecting the documents discovered the loss and alleged tampering. So far as Mr. Mandal is concerned it is to be noted that it was therefore possible on the evidence that the abstraction and tampering, if it took place, was done when admittedly he was absent at the High Court and when Arnfield and the insolvent were together.

As an answer to this case about the letter of the 6th March it is pointed out that it is an admitted fact that there was some discussion at the search as to some of the documents being necessary because of the possibility of a prosecution by the Delhi merchant Babumull. According to one hyhothesis put before us Mr. Mandal had not at the time of the search determined that any document should be tampered or made away with. If this be so, the reference to these documents at the search could not have been a mere pretence. If so there is nothing in the point that the information sought have been and was not obtained at the search, whether this was possible or not. It is suggested however that after the search when the documents were taken away the criminal intention may have been formed and in pursuance of it a demand was made on the 6th for documents relevant to the criminal charge in order that there might be an ex-

cuse for the presence of the insolvent and his solicitor at the Assignee's office on the 7th. The two hypotheses do not work together. I think that the admitted fact that the need for the documents was mentioned at the search is a circumstance against the case made against Mr. Mandal that the letter of the 6th March and the demand for the documents was a mere pretence. As regards the reasons given by Mr. Mandal for wanting the documents if was not a date only which was required but the press copy book in which the telegram was copied, in order that the words used might be before him in dealing with the threatened criminal charge.

Reliance is placed on the fact that the statement in the letter of the 6th March is not challenged in the correspondence by Mr. Falkner, who in his evidence states that on the 7th the insolvent and his solicitor came to him for a copy of a letter in the press copy book "As (to use his words) it was necessary in view of the criminal charge that they had spoken to me about the previous day." Either this is an admission that the Assignee did see them the previous day or possibly Mr. Falkner meant to say that Mr. Mandal told him on the 7th that he had been spoken to on the previous day. If the latter this supports the defence that Mr. Mandal did see Mr. Falkner. For it is then shewn not only that he wrote to that effect but restated the fact at the interview on the 7th. It is possible that Mr. Falkner's memory may not be accurate on this point. We have it that Mr. Avetoon (I presume on instructions) stated that the letter of the 6th March was a fabrication but subsequently had to withdrew it as it was found the letter had been in fact received.

I am unable therefore to hold that it has been established that Mr. Mandal was putting forward a pretended interest in the documents relating to the threatened criminal charge in order to account for his presence at the office on the day of the alleged tampering and theft.

If this be so I cannot say that there was no reason for Mr. Mandal visiting the office of the Assignee with his client the next day. It is said that he went early, though it is to be observed as to this that the adjudicating orders shew that the office hours were from 10 to 4. But apart from this Mr. Mandal wished to get away to Court and he in fact left immediately after the arrival of the Official Assignee. If in fact, as the evidence generally states, Arnfield used to come late after the Assignee, this is a circumstance unexplained and to that extent circumstance of suspicion but does not by itself go far. This is a matter for Arnfield himself to explain but he is not called, though I think that the Official Assignee was justified

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under the circumstances in not calling him as his witness as he could not put him forward as a witness of truth.

I now pass to the evidence of what occurred at the office when the insolvent and his solicitor were there. This depends entirely on the evidence of the witness Bamdeo who the learned Judge thought to be a trustworthy witness and I accept his impressions on this point. I say entirely because the witness Harish De the learned Judge thought to be not satisfactory and accepted only his evidence so far as it was corroborated by Bamdeo. It is of course open to the Court to accept part of the story of one witness who is not reliable if it be corroborated by another who is reliable. But to accept the story is not necessarily to say that the evidence is stronger because of its being spoken to by two witnesses; since the acceptance of one witness' statement is not on his credit but on that of the other reliable witness who supports him. There is some ground for believing that this witness Harish was inimical to Mr. Mandal and he in fact introduces features in the evidence not spoken to by Bamdeo or mentioned in the statement to Mr. Falkner or Harish himself, namely the important alleged incident of Mr. Mandal handling the documents in the tiffin room of Arnfield, which is in contradiction to Bamdeo's evidence who says nothing about handling papers and that Mr. Mandal left the room leaving Perry and Arnfield there. Bamdeo's evidence is that Arnfield arrived at 9-45 and Mandal at 9-50. The witness was told to fetch Perry who was outside. Then Arnfield opened the tiffin room where the box with the documents was and all three went inside. After two or three minutes Mr. Mandal went out leaving Perry and Arnfield together for 10 minutes. Then Perry went out, Harrish De's account is discrepant with this but both agree that Mandal and Perry were in the tiffin room, and this seems to have been reported to the Official Assignee. It is noteworthy that Perry and Arnfield were together on the two occasions, before and after the arrival of the Official Assignee, and Mr. Mandal was there on the first occasion, and it is possible that there may be some confusion in Bamdeo's mind in mixing up these two occasions. However this be, I am not prepared to hold that the evidence of Bamdeo is sufficient unless it were shewn (as in my opinion it is not) that both the events leading up to, and following the facts spoken to by him sufficiently support the respondent's case. It is certainly noteworthy that if these persons had the intention before the Official Assignee came to tamper and abstract the documents, that they should have left the door open for others to see what they were doing and that the

peon was not sent away on some business or other. Then we find both, after the supposed incident, going to the Official Assignee. It is noteworthy also that it was at one time proposed to bring criminal proceedings against Perry and Arnfield alone, no mention being made of Mr. Mandal.

It was suggested that Mr Svamvar and Arnfield may have been in complicity. This I do not believe. The insolvent's charges on this head had been disbelieved by the learned Judge and his case has not been advanced thereby, nor by his absurd allegation that the Official Assignee himself was withholding books. It could not have been Svamvar's interest to get rid of either any pages of Ex. F or the diary. But though the making of such unfounded charges may detract from the insolvent's explanations they cannot by themselves establish the Assignee's case.

It is possible that Arnfield, who, on the evidence before us is *prima facie* responsible and an unreliable man, might have had some interest in embarrassing the creditor's case as regards Exhibit F but this cannot I think be suggested as regards the diary the value of which was not apparent till the insolvent's examination later on. That the insolvent may have had an interest to make away with and tamper with the books is I think indisputable. But the question is has it been made out that he did so? The case against him would have been stronger had it not been asserted that Mr. Mandal was aiding and abetting him. This on the evidence I cannot believe and as the charge against Mandal is mixed up with that against Perry it is not possible I think, in this case, in the view I take of the matter so far as Mr. Mandal is concerned, to hold that the charges have been established against the insolvent though there are circumstances of suspicion against him.

In the result therefore I must hold that the charges against the insolvent have not been made out. I do not believe upon the evidence that Mr. Mandal was aiding and abetting as alleged I accept his evidence that when he was in Arnfield's room there was no handling of the papers, and no case has been made that in his absence on either the first or second occasion of Perry's visit to Arnfield the insolvent committed the alleged offences. On the contrary the case throughout has been that the two were jointly concerned in committing the offences alleged—an allegation which in my opinion fails.

The appeal therefore succeeds and the order of the 28th May, 1919, sentencing the insolvent to imprisonment is, as regards all the

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charges, reversed. The surety for the appearance of the insolvent during the hearing of this appeal is discharged.

Walmsley, J.:—I agree in the judgment delivered by Mr. Justice Woodroffe.

N. C. Mandal: Attorney for the Appellant.

Mr. Orr Dignam: Attorney for the Respondent.

A. T. M. *Appeal allowed.*

Before Sir Asutosh Mookerjee, Knight, Judge, and Sir Ernest Edward Fletcher, Knight, Judge.

MOHAMED KALIMUDDIN

v.

A. B. STEWART AND OTHERS.*

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January, 14.

Member, expulsion of—Committee, when can expel—Rules of natural justice.

The Committee empowered to expel a member must make a fair enquiry into the truth of the alleged facts, after giving notice to the member concerned that his conduct is about to be enquired into and giving him an opportunity of stating his case to them.

In order to determine whether a tribunal, which exercises a punitive jurisdiction on an alleged charge of misconduct whereby a man may be deprived of his property, in the exercise of *quasi* judicial powers, has given a decision which cannot be successfully challenged, the Court has to investigate whether they have observed the rules of natural justice and also the particular statutory or other rules, if any, prescribed for their guidance: *Andrews* v. *Mitchell* (1). The rules of natural justice demand that a man is not to be removed from office or membership or otherwise dealt with to his disadvantage, without having a fair and sufficient notice of what is alleged against him and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions are satisfied, a Court of justice will not interfere with the decision.

Appeal by the Plaintiff.

Suit for declaration that the proceedings of the Committee of the Calcutta Stock Exchange Association expelling the plaintiff from its membership were void and inoperative. The suit was dismissed by the following judgment of

1918.
November, 26.

Rankin, J.—The plaintiff sues in this action the members of the Committee of the Calcutta Stock Exchange Association for the purpose of having it determined that the proceedings of the Committee which took place on 27th September 1916 and 2nd December 1916, and by which he was expelled from the association, were invalid and for relief accordingly. The defendants have dropped all questions as to any errors there might be in the exact persons who ought to have been sued.

It appears that some days before the 15th September, 1916,

* Appeal from Original Decree No. 3 of 1919, against the decision of Mr. Justice Rankin, dated the 26th November, 1918.

(1) (1905) A. C. 78.

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the plaintiff, who was a broker and a member of the association, had a certain verbal conversation or negotiation with a representative or representatives of a firm called Ram Kissen Surajmull as to the proposed sale by the plaintiff to this firm of 100 ordinary Empire Jute Mills shares. The plaintiff says that this negotiation was held in the presence of a considerable number of persons at a busy time of the day, but that in fact in the end no bargain was concluded. Ram Kissen Surajmull alleged that the verbal contract for sale of these shares was concluded, and the plaintiff, not having made delivery, Surajmull complained to the Committee of the Stock Exchange by a letter of 15th September 1916, which is in evidence in this case. The complaint having been received the matter came before the Committee at three meetings: 27th September, 2nd December 1916, and 12th January 1917. I am satisfied that the minutes of those meetings, though not nearly so full as is to be desired, are correct so far as they go. Now, by the rules of the Stock Exchange produced before me it appears that there is but one rule, and that a simple one, under which the Committee could exercise any jurisdiction over the plaintiff in such a matter, and it is clear law that there is no inherent or implied jurisdiction on the part of an association such as this to expel any member; and leaving out all words which have no bearing upon this case, rule 10 provides that the member shall cease to be such on the happening of any of the following events: (*a*) On the Committee being of opinion that he has failed to deliver in due course securities sold (*b*) On his being found guilty in the opinion of the Committee of conduct justifying his expulsion.

For purposes of this case I may confine myself to (*a*) because I think that the attempt to put any case at all upon clause (*b*) merely burdens the defendant's case. I am quite satisfied that no charge under clause (*b*) was even mooted at the meeting of the 27th September, and I find in the result that apart from the trial on the 27th September there was, and purported to be, no trial at all. I confine myself, therefore, to clause (*a*) of the rule. Now it is to be noticed that the jurisdiction given by rule 10 is not given as a jurisdiction for the settlement of disputes or as the establishment of a domestic Court of arbitration. Though the matters specified in rule 10 probably comprise everything that can well become matter of dispute so far as ordinary Stock Exchange business is concerned, the only jurisdiction to enquire into and to determine them is the jurisdiction to come to a finding upon which the membership of the party against whom it is pronounced, shall cease. The *ultima* ratio is the

only ratio. Putting aside the provision in rule 4 that 5 members shall form quorum (on which nothing in this case turns), no regulations have been proved or even suggested by which a procedure is laid down for the Committee. There is no rule as to the giving of a written notice to the parties concerned. There is no rule requiring a definite length of notice. There is no rule as to what information any notice must contain. Still less is the Committee hampered in the exercise of its single and drastic power by the requirements of any special majority. The only thing it can do is to expel, and subject to the law of the land, it can do that as it likes. Now, it is quite clear in a case of this sort where there is no contention that the rules of the society are themselves unreasonable, that the law will jealously consider; first: whether the rules have been strictly obeyed; secondly: whether the decision has been *bona fide*; and thirdly: whether the proceedings have been conducted according to the principles of natural justice; and in this last matter there is included as part of the requirement of natural justice the requirement of a reasonable notice to the party complained of as to what he is going to be tried about. Now, the plaintiff in this case complains, not of breaches of any procedure rules of the association (for such rules there are none), but of the general and paramount principle of law that such a jurisdiction must be exercised *bona fide*, and in accordance with natural justice. Turning to the plaint for particulars I find that paragraphs 7 to 12 of the plaint disclose the following specific allegations and no others—that on the 27th September the Committee heard the complainants and their witnesses, but did not, and would not, allow the plaintiff to cross-examine in spite of his request, or to call evidence on his own behalf although his witnesses were present. Para 10 charges that the Committee acted in bad faith. Para 11, as I read it, is meant to allege that the plaintiff's expulsion was determined on this meeting of 27th September, and Para 12 intimates no fresh complaint of the Committee's procedure when referring to the meeting of the 2nd December. The meeting of January 18th is not referred to as a meeting at all though the plaintiff was present thereat as he himself told me in the box. The case then with which the plaintiff comes into the Court is simply this; that the Committee at the meeting of 27th September decided upon his expulsion without allowing him to cross-examine the witnesses against him or to call evidence on his own behalf; and speaking for myself, if this were proved, I for one should have little difficulty in holding the charge of *mala fides* proved.

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When the case was opened to me by plaintiff's counsel the only issue offered by him or settled by me was as follows, and this was accepted by both sides :—

"Whether the action of the Committee on 27th Septetmber, 1916, and 2nd December, 1916, or one or other of these dates was contrary to natural justice in respect of the absence of an opportunity to the plaintiff to cross-examine or to call witnesses on his behalf."

When the plaintiff came to give his evidence, however, he alleged two further facts as matters of complaint against the conduct of the Committee at both meetings, but more particularly at the first meeting. The first complaint was that he had no notice or no sufficient notice of the meeting. The second was that he never knew until after the third meeting of the 12th January that the Committee had decided against him at the first meeting and ordered him to make delivery by the 6th October. Having regard to the charge of *mala fides* and to the fact that the question of notice might have a bearing upon the question as to whether the plaintiff had a real and proper opportunity of producing evidence and of cross-examination. I did not think it necessary or advisable to shut out this evidence of new grounds of complaint. It was proved before me in the course of the case, however, that the one person who could give any proper or valuable evidence for the defendants as to these new grounds, was the gentleman who at the time acted as secretary to the association, and that as he was serving with his Majesty's Forces, his evidence could not without some time and difficulty be obtained. In these circumstances I drew the attention of learned counsel for the plaintiff to the position thus created when the question of insufficient notice was referred to by him in his reply. He very properly and frankly explained that the first time he had heard of this ground of complaint was when the plaintiff gave his evidence in the box and after the opening of the case and settlement of the issue. On being put to his election whether or not he would ask leave to amend his pleadings so as to enlarge his case, and upon being told by me that such leave if granted would only be granted upon terms as to costs, he elected not to ask for such leave but to go on with his case, as it was. The two new grounds are both of them in the same position; the only difference between them being that on the evidence I am fully satisfied without further evidence from the defendants, that the second ground is utterly unfounded in fact. Neither ground is now open to the plaintiff.

I come now to the meeting of 27th September, and to the question whether the plaintiff was refused leave to cross-examine the complainant's witnesses. In answer to his own counsel when examined-in-chief, the plaintiff gave the following answers :—

"Did any question of cross-examination arise ?—No."

"Did you want to put any question to anybody ?—I said that their statement was incorrect ; and asked the committee to take the evidence of my witnesses, and that I was in a position to prove it."

Now, that is the only piece of evidence given by the plaintiff on the subject so far as I can find. In my opinion this statement of the plaintiff's is not true. I find it proved that he did in fact cross-examine the witnesses for the complainant as is deposed to by the Committee members called for the defence, but it is enough to say that reading the plaintiff's own evidence by itself, there is not a tittle of evidence that the right of cross-examination is demanded by and refused to the plaintiff. When challenged to enumerate his grievances in cross-examination the plaintiff does not include this as one. The witnesses summoned, Sham Lal Laha, Girendra Nath Roy, and the evidence of the Chairman, Mr. Berridge, taken before this Court in June, leave me no room for doubt that the Committee was most anxious to be fair to the plaintiff. The mere fact as to what they did to give him time to comply with their decision showed that they were willing to be not only fair, but considerate. The plaintiff himself disclaimed the suggestion that the Committee were inimical to him and the plaintiff's own counsel withdrew in his reply the suggestion that there was any malice towards the plaintiff. In these circumstances it is not easy to see how the Court can be invited to believe that this Committee of representative brokers allowed themselves to deprive the plaintiff of what every one knows to be essential to the very semblance of a fair trial. It gives me a very bad impression of the plaintiff's case when I find that if I look back to the letter of 19th January, 1917, in which, the plaintiff having just been excluded from the Exchange and having taken legal advice, his attorneys put forward his case for the first time, the allegation that "he asked for an opportunity to cross-examine the complainant to falsify the complaint; we were informed that he was not given a chance" is the only specific allegation in that letter. It is highly improbable—there is no evidence in support of it—the untruth of it has been plainly established before me.

The next complaint is that the defendant was not allowed to call witnesses on his own behalf. The plaintiff's evidence in examination in-chief is on pages 4, 5 and 6 of the shorthand notes ; in cross-

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examination his story is the same, and it is often repeated. Pressed in cross-examination for the names of the witnesses whom he wished to call, he gave four names, one of which is Raghubir Chobey. When recalled into the witness box at a later stage and asked by me what these four witnesses were to give evidence about, he answered that they were not witnesses who were present at the time of the alleged contract, but were to prove that he had taken an oath in the name of the Koran, an episode which I find described on page 3 of the notes. I find it proved by the defendants that the plaintiff's story here again is utterly untrue. It is quite true that the defendant's evidence is not so precise or so clear as I should have been entitled to expect. The reason is that no proper record of what happened at the meeting in the way of calling and examining witnesses was made at the time, and the defendant's witnesses have nothing whatever to assist their recollection of what took place some two years ago. The Committee certainly would be well advised to record such matters if only as a protection to themselves, but still I find as a fact that he did call witnesses ; that he could have called, and did call as many witnesses as he liked ; that one of the witnesses actually called by him was the very Raghubir Chobey, whose name the plaintiff mentioned. No charge could be more clearly a charge of malice and bad faith against the members of the Committee than to say that in a dispute as to the existence of a verbal bargain, evidence was offered by one side and that evidence was summarily shut out and judgment then given against him. Take away the suggestion of malice, and the charge becomes practically incomprehensible. Business men may be amateur lawyers ; they may be summary in their methods or have inaccurate notions of procedure, but to shut out *all dependent evidence* in a case such as this was would not occur to one man in a thousand or even one dishonest man in a hundred. The evidence of Mr. Somers for example according to what happened at this meeting was extremely hazy. He would hardly pledge himself to any precise and particular fact, but I am quite sure, having seen Mr. Somers in the box, that if anything such as the plaintiff alleges had taken place, Mr. Somers would have noticed it and would have remembered it for a very long time. I am quite sure that he would not have forgotten what was contrary to all his ideas of fair play, and I am quite satisfied the evidence of Mr. Somers, however vague, is strongly in support of the defendant's case upon an issue such as this. I have seen three members of the Committee in the box ; I have had some opportunity of gauging the account

given by the Chairman in June. I am convinced not only that they were honest, not only that they were reasonable, but that they were conscientiously determined that the plaintiff should have fair play. My opinion on this is confirmed when I look at the plaintiff's attorney's letter of 19th January, the letter in which the refusal of leave to cross-examine is alleged. There is not a word in that letter of this yet more crude injustice, the refusal of leave to call his own witnesses. The letter of 9th February is equally without a reference. Whatever else might have been left to be covered by general expressions, this at least any attorney would have put in the forefront of his case, and most with caustic comment. I think I should be doing less than justice to the members of the Committee if I failed to say that I do not think that the plaintiff's evidence as to the way in which their business was conducted at the meeting of the 27th September has any degree of credibility at all; that I accept the evidence of the defendant's witnesses as vindicating the Committee and every member of it from the allegations upon which this action has been brought.

Now, the Committee tried the issue between the plaintiff and complainant once and only once; they decided against the complainant on the 27th September. Their decision was, and could be only one thing in substance, *viz.*, that he had failed to deliver in due course securities sold. In justice, or perhaps in mercy to the plaintiff, instead of putting forward at once the formal expression of their finding in such a way that the plaintiff would necessarily be expelled, they delayed giving such expression to it in order to give him a chance. He was given till the 6th October to deliver, and, as we know, he did not deliver. The next meeting was the 2nd December. It is common ground that at the meeting of the 2nd December the case was not re-heard. The question, and only question then was whether the plaintiff had availed himself of the indulgence accorded to him to enable him to evade the necessity for formal expression of the finding come to at a previous meeting, and to evade the penalty which was attached thereto. It is quite clear that his own statements at the second meeting showed that he had thrown his chance away. The plaintiff now alleges that not even at this meeting did he know—not indeed till after the 12th January did he know—what the finding of the Committee of the 27th September had been. I disbelieve this altogether. I think that that is a farrago of sheer untruth. I am satisfied that what happened at the meeting was that the plaintiff was obstinate that he was reasoned with, and was warned. Unfortunately he was reasoned with and warned in vain.

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Not only so, but it appears from the evidence of Sham Lal Laha that a kindly suggestion of settlement was pressed both on the plaintiff and complainant. Even at this late stage the matter might have been settled by agreement between them. Nothing was done. The matter came again before the meeting of the 12th January, and not till then when it was evident that the plaintiff had done nothing, and was permanently minded to do no thing—were the full consequences of the decision of 27th September carried into effect. The Committee did their best to save him, but he would not be saved.

I must add a word as to another issue which has been abandoned. That is the issue that plaintiff was entitled to take some advantage of the fact that the complainants were an insolvent firm, and had no right to be members of the association. It turned out before me that the complainants were adjudicated insolvents on 27th November, 1912, but that they were discharged prior to the proceedings about which I am now concerned, *viz.*; on the 24th March, 1916, so that this point also has failed. Finding as I do that the Committee's proceedings were not unfair, that they have been attacked as to their *bona fides* most unjustly, the plaintiff's case is disproved in every point. I do not think it my duty to examine into the question whether any more points could possibly have been taken by way of objection to the proceedings. But I may add that if there are any more of these cases, the Committee would be well advised to bear in mind what I have said as to the true construction of rule 10, to remember that a tribunal which is slack about keeping a full record of its proceedings will always find itself in trouble; that they should be as full, formal and accurate as possible in all matters of recording their proceedings giving notice as to complaints and decisions. I leave it to them to obtain advice from others as to the application in detail of these criticisms.

The action must be dismissed with costs.

Against this decision, the plaintiff appealed.

Messrs. A. N. Chaudhuri, B. C. Ghose and *S. N. Dutt* for the Appellants.

Messrs. L. James, and *Ameer Ali* for the Respondents.

The judgments of the Court were as follows :

January, 14.

Mookerjee, J.—This is an appeal by the plaintiff in a suit for declaration that the proceedings of the Committee of the Calcutta Stock Exchange Association expelling him from its membership were void and inoperative. Mr. Justice Rankin has dismissed the suit

on the ground that the plaintiff has failed to establish that the proceedings were vitiated by illegality.

The tenth paragraph of the Rules and Regulations of the Association contains the following provisions: "Cessation of membership :—A member shall cease to be such on the happening of any of the following events : (a) Subject to the present existing regulations regarding adjudication on time bargain contracts, on the Committee being of the opinion that he has failed to pay in due course for securities delivered or to deliver in due course any difference in respect of any bargain or fail to pay any money due by him in any way arising from any Stock Exchange transaction, either directly or indirectly, or that he has become or been adjudicated a bankrupt : (b) On his being found guilty, in the opinion of the Committee, of conduct justifying his expulsion."

On the 15th September 1916, Ramkisen Dass Soorajmull reported to the Honorary Secretary of the Calcutta Stock Exchange Association that on the 6th September they had purchased from Mahomed Kalimuddin (the present appellant) 100 ordinary Empire Jute Mills shares at Rs. 37-4-0 per share, delivery for one week's time from the date of sale, and that he had failed to deliver the shares due. As this was a matter which could be dealt with by the Committee under clause (a) of Rule 10, a meeting of the Committee was held on the 27th September, 1916, when the following resolution was recorded : "Dealt with a complaint of Ramkishen Soorajmull against Kalimuddin Khan with regard to an alleged transaction ; the Committee being of the opinion that the transaction actually did take place, the Honorary Secretary was instructed to inform Mahomed Kalimuddin that he must deliver the shares to the complainant within 6th October." The matter was next considered at a meeting held on the 2nd December 1916, when the following resolution was recorded. " Further, a letter was received again from Ramkissen Dass Soorajmull complainant against Mahomed Kalimuddin. It was resolved that the decision of the Committee arrived at on the 27th September must be enforced or Mahomed Kalimuddin be expelled." Finally, on the 12th January, 1917, the Committee recorded the following resolution : "Received a further complaint from Ramkissen Das Soorajmull against Mahomed Kalimuddin and it was resolved that in view of the decision of the Committee arrived at on the 27th September and again confirmed at a Committee meeting on December and, at both of which meetings the latter attended, was duly informed of such decision, the Honorary Secretary was instructed to notify him that under the Rules of the Asso-

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ciation his membership had ceased and thereby warned not to enter the rooms of the Committee." This decision was intimated to the plaintiff on the same day; and he thereafter instituted the present suit on the 7th September, 1917.

Mr. Justice Rankin states in his judgment that when the case was opened by the plaintiff's counsel, the only issue offered by him was as follows and this was accepted by both sides:—"Whether the action of the Committee on 27th September 1916 and 2nd December 1916 or one or other of these dates was contrary to natural justice in respect of the absence of an opportunity to the plaintiff to cross-examine or to call witnesses on his behalf." At the trial, however, two further facts were stated as matters of complaint against the conduct of the Committee at both meetings, namely, first, that he had no notice or no sufficient notice of the meeting; and secondly, that he never knew, until after the third meeting of the 12th January, that the Committee had decided against him at the first meeting and ordered him to make delivery by the 6th October. The learned Judge held that if the plaintiff desired to rely upon these two grounds, the plaint must be amended, and expressed his willingness to grant leave to amend on terms as to costs. The plaintiff, however, elected not to ask for such leave and to go on with the case as it was. Consequently the substantial question in controversy which has been decided is that formulated in the case as opened by the counsel for the plaintiff. The learned Judge has held that the story of the plaintiff cannot be accepted as true. We have considered the whole evidence which has been placed before us and commented upon by the learned Advocate-General and we have arrived at the conclusion that the decree made by the Court below should not be disturbed.

The rules applicable to cases of this character are well settled and are based on the principle that the Committee empowered to expel a member must make a fair enquiry into the truth of the alleged facts, after giving notice to the member concerned that his conduct is about to be enquired into and giving him an opportunity of stating his case to them. The leading decisions on the subject are the judgments of Sir George Jessel in *Labouchere* v. *Earl of Wharncliffe* (1); *Russell* v. *Russell* (2); and *Dawkins* v. *Antrobus* (3). The first case emphasizes the importance of fair enquiry after notice to the member concerned and opportunity given to him to meet the charge. In the second case Sir George Jessel referred with ap-

(1) (1880) 13 Ch. D. 346 (350). (2) (1880) 14 Ch. D. 471 (478).
(3) (1879) 17 Ch. D. 615 (622).

proval to the decision of Kelly C. B. in *Wood* v. *Wood* (1) and observed as follows: "I must say it contains a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than Judges who have judicial functions to perform. The passage I mean is this, referring to a Committee; they are bound in the exercise of their functions, by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

In the third case, stress was laid on the aspect that a power of expulsion must be exercised *bona fide* and not from any indirect or improper motive, and this view was approved by the Court of Appeal. These and other decisions were reviewed by Astbury J. in *Cassel* v *Inglis* (2), where the rule was stated to be that tribunals which exercise a punitive jurisdiction on an alleged charge of misconduct whereby a man may be deprived of his property, must act in accordance with the ordinary rules of justice and fair play and fairly listen to both sides. The essence of the matter thus is that, in order to determine whether a tribunal of this character, in the exercise of quasijudicial powers, has given a decision which cannot be successfully challenged, the Court has to investigate whether they have observed the rules of natural justice and also the particular statutory or other rules, if any, prescribed for their guidance: *Andrews* v. *Mitchell* (3). The rules of natural justice demand that a man is not to be removed from office or membership or otherwise dealt with to his disadvantage, without having a fair and sufficient notice of what is alleged against him and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions are satisfied, a Court of justice will not interfere with the decision.

Now, in the case before us, the first meeting of the Committee was held on the 27th September, 1916. There is no doubt upon the evidence that the plaintiff was present on that occasion, brought forward witnesses, and cross-examined the witnesses who were produced by his opponent. An objection could have been raised

(1) (1874) L. R. 9 Ex. 190 (196). (2) (1916) 2 Ch. 211 (229).
(3) (1905) A. C. 78.

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by him that he had no notice or sufficient and precise notice; but that was not the position taken up by him. He did not complain that he had not such notice and was placed at a disadvantage because he did not know what was alleged against him. On the other hand, the evidence makes it clear that he knew what the case against him was; viz, that the complainant alleged that there had been a breach of the contract entered into with him on the 6th September 1916 for the sale of 100 Empire Jute Mills shares to be delivered within a week. He denied the existence of the contract. The Committee came to a different conclusion; and thereupon it was within the competence of the Committee to make an order forthwith for his expulsion. This, however, they did not do. They instructed their honorary secretary to inform the appellant that he must deliver the shares to the complainant within the 6th October. The Advocate-General has contended that by this the Committee really made a new contract between the parties and that the plaintiff has been expelled from the association, not because of his failure to carry out the original contract, but because of his failure to carry out the order of the Committee. We are of opinion that there is no force in this contention, and the action of the Committee cannot be successfully impugned on this ground. The order of the Committee recorded on the 12th January shows that the plaintiff had attended both the previous meetings and that he had been duly informed of their decision. The oral evidence also shews that the plaintiff was present at the meeting held on the 2nd December, 1916. It has been argued, however, there is no satisfactory evidence to show that the decision of the Committee, dated the 22nd September, was ever communicated to the plaintiff. But the plaintiff did not take up this position on the 2nd December. He did not urge that he was willing to abide by the decision of the Committee and that he had failed to deliver the shares to the complainant on or before the 6th October, because he had no intimation of their order. On the other hand, the evidence shows that he took up a determined attitude not to abide by the decision of the Committee. Ultimately, on the 12th January 1917, the Committee came to the conclusion that the plaintiff must be expelled. This expulsion in substance was by reason of his failure to carry out his contract with the complainant; and the leniency which the Committee had shown to the plaintiff unquestionably did not vitiate the proceedings.

The result is that the judgment of Mr. Justice Rankin is affirmed and this appeal dismissed with costs.

Fletcher, J.—I agree.

Babu Probodh Chunder Mitter: Attorney for the Appellant.

Messrs. Orr, Dignam & Co.: Attorneys for the Respondents.

A. T. M. *Appeal dismissed.*

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RAM KISSEN JOYDOYAL

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February, 9.

Perpetual injunction—Specific Relief Act (I of 1877), Secs. 53, 54, 56—New point, when can be raised in appeal.

The right to an injunction depends, in India, upon statute and is governed by the provisions of the Specific Relief Act: *Tituram* v. *Cohen* (1) followed.

Section 53 of the Specific Relief Act defines the mode in which a perpetual injunction can be granted and its restraining effect on the defendant when it has been granted.

In order to entitle a litigant to a perpetual injunction, he must establish that the injunction is required to prevent a breach of an obligation. "The term 'obligation,' according to section 3 of the Specific Relief Act, includes every duty enforceable by law, so that when a legal duty is imposed in one person in respect to another, that other is invested with the corresponding legal right.

The first paragraph of section 54 of the Specific Relief Act, establishes the broad and general rule that given the breach of an existing legal right which is vested in the applicant, the breach thereof may be restrained by injunction.

When a plaintiff applies for an injunction to restrain a violation of an alleged right, if the existence of the right be disputed, he must establish that right before he gets the injunction to prevent the recurrence of its violation: *Imperial Gas Light Co.* v. *Broadbent* (2) referred to.

Sections 54 and 56 of the Specific Relief Act are to be read together as supplementing each other. The former defines the circumstances under which perpetual injunctions may be granted; the latter enumerates the cases where an injunction must not be granted. The right to an injunction cannot be determined indepen-

* Appeal from Original Decree No. 39 of 1919, against the decision of Mr. Justice Greaves, dated the 29th April, 1919.

(1) (1905) I. L. R. 33 Calc. 203; L. R. 32 I. A. 185; 2 C. L. J. 408.

(2) (1859) 7 H. L. C. 600 (612).

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dently of the provisions of sections 54 and 56 by reference to the terms of section 53.

An injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding (except in case of breach of trust).

A pure question of law, not depending on the determination of a question of fact, though not raised in the primary Court nor mentioned in the memorandum of appeal, and is not one of jurisdiction in the sense of competency of the Court to entertain the suit, can be raised at the hearing of appeal, if it goes to the root of the matter and raises the question whether the Court was competent to grant the relief claimed by the plaintiff.

Appeal by the Defendant.

Suit for a perpetual injunction to restrain arbitration proceedings before the Bengal Chamber of Commerce Tribunal of Arbitration. The suit was decreed by the following judgment of

1919.

April, 29.

Greaves, J.—In this suit the plaintiffs seek for a declaration that they did not enter into a certain Contract No. 128 with the defendants dated the 13th December 1916 and that it is not binding on them and for an injunction restraining the defendants from proceeding to arbitration thereon before the Bengal Chamber of Commerce pursuant to a clause contained in the contract. The only issue which arises in the suit is whether the plaintiffs are liable on this contract. The evidence is as follows. On behalf of the plaintiff Hari Bux who is a partner of Puranmull (the firm named being Choonilal Gobordhone Das) stated that his firm did not know the defendant firm before they received their letter of the 24th May 1917 which is contained in Ex. G, that his firm were Commission Agents and had no transaction in hessians to which the contract relates. He denied that his firm asked any body to enter into any contract on the 13th December 1916 or that they received any bought and sold note or any confirmation letter in respect of the transaction and he denied that certain initials shown him in a peon book of Messrs. Pugh and Co, were signed by his firm or by any one belonging to the firm or that the initials *Ck* and *Ga* in the defendants' peon book were in the handwriting of any one in his firm. In cross-examination he stated that one Tansook Roy a broker who was living in the same house with him told him in November 1916 that he had done a hessian transaction for him that he told Tansook Roy that he had never ordered him to do this and that Tansook Roy told him two or three days later that he had arranged about the contract and sold to another party and that he signed his firm's name on a cheque drawn in favour of his firm by Bagatram Sew

Protap at Tansook Roy's request but that he made no another payment. He denied having seen one Ramgopal of the firm of Ramgopal Bahitram prior to the 31st May 1917. On behalf of the defendants Ramgopal, a member of the firm of Ramgopal Bohitram, stated that he sold to the plaintiff firm 2 lbs of "B" Twills in November 1916, the contract being entered into by Tansook Roy Pursoram, and that he went to the plaintiffs for payment against delivery order and met Hari Bux who gave him a cheque and Rs. 75 in cash and that he made an entry in his cash book. With regard to the transaction in suit he stated that he was the under broker and that he had an entry in his books under date the 13th December 1916, that he received instructions from Nitamul of the defendant firm to sell the goods referred to in the contract and that he met the broker Tansook Roy and made the bargain through him but that as he did not trust him absolutely he went to the plaintiff's Gadi, and met Hari Bux who accepted the bargain and that he told the defendants that the sale had been effected to the plaintiffs. He further stated that in May 1917 he went to see Hari Bux at his Gadi and that there was some talk as to a settlement. In cross-examination (Q and A 93) he stated that Tansook Roy did not come to the defendant firm with an offer from the plaintiffs and in Q and A 122—125 he stated that in transactions such as the one in suit it was usual to have bought and sold notes and confirmatory letters from both sides and receipts for the bought and sold notes but that in this transaction the defendants had told him that there was no confirmatory letter from the plaintiffs.

Nitamull, a son of one of the partners in the defendant firm who looks after the business of the firm on his father's behalf, stated that prior to the contract in suit he gave an offer to Ramgopal and that he reported that he had sold the goods to Choonilal Goberdhone Das through Tansook Roy and that they made an entry in their books. He stated that on the 13th or 14th December he got the contract but that he subsequently sent it to The Bengal Chamber of Commerce and had not got it back. That on the 28th December 1916 he sent a paper to the plaintiffs' Gadi and subsequently saw the peon book which had been sent with the paper, that on the 2nd or 3rd May Hari Bux came to his firm's Gadi and suggested settling for the April loss for Rs. 600.

Ram Kishore a durwan in the employ of the defendants stated that he knew the plaintiffs' Gadi from taking a letter there from the defendant firm about Christmas 1916. He stated that he handed the letter over and that after that the initials appearing in the peon

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book were put and that he was asked from whom the letter came and stated that it came from the defendants.

Haripada Bose, Messrs. Pugh and Co.'s despatching clerk, gave evidence as to the despatch of two letters of the 30th April and the 18th May and Jitendra Nath Dutt an assistant in Pugh and Co., produced press copies of these letters and Shamlal and Ranjan peons of the firm gave evidence as to taking letters to the plaintiffs' Gadi. The material documentary evidence consists of Exhibit 2A the defendants' entry of the contract in their Sowda book which states that the sale was effected through the broker Tansook Roy and of two entries in the books of Ramgopal Bahitram one being in the cash book as to the B Twills transaction purporting to show receipt of a cheque and Rs. 75 in cash from the plaintiffs and the other being in their Brokerage book of the transaction in suit.

It is I think clear upon the evidence that the broker Tansook Roy did enter into the contract in suit and what I have to decide is whether he did so under authority from the plaintiffs and on their behalf or if not whether the plaintiffs came to know of the contract and subsequently ratified and accepted it. Unfortunately Tansook Roy has disappeared and could not be called and it is not established to my satisfaction that he had authority from the plaintiffs to enter into this contract on their behalf. Ramgopal was not a satisfactory witness and I am not prepared to accept his evidence on any point and it is noticeable that his name is not mentioned in the evidence on the motion to restrain the arbitration before the Bengal Chamber of Commerce, the defendants stating in their affidavit that Tansook Roy came with an offer from the plaintiffs which they accepted and which is a different story to that now put forward. Nitamull struck me as really knowing very little about the matter and I cannot accept his evidence as reliable. The only thing therefore to connect the plaintiffs with the transaction is the defendants' letter of confirmation of the 28th December 1916 which I think upon the evidence was delivered at the plaintiffs' Gadi and I think I must hold was received by them but I do not think that this is sufficient by itself to make them liable. I think therefore that I must make the declaration which I am asked to make and I accordingly declare that the plaintiffs did not enter into the Contract No. 128 of the 13th December 1916 and that the same is not binding on them and I restrain the defendants from proceeding with the arbitration in respect of the contract before the Bengal Chamber of Commerce and the defendants must pay the costs of this suit on Scale No. 2 which will include reserved costs, if any.

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Against this decision, the defendant appealed.

Messrs. N. Sarkar, Langford James, and *S. C. Bose* for the Appellant.

Messrs. H. D. Bose, and *R. N. Mitter* for the Respondents.

The judgments of the Court were as follows:

Mookerjee, J.—This is an appeal by the defendant in a suit for a perpetual injunction to restrain arbitration proceedings before the Bengal Chamber of Commerce Tribunal of Arbitration. The plaintiffs instituted this suit for declaration that they did not enter into the contract No. 128 with the defendant dated the 13th December 1916, that the contract is not binding on them and that they are accordingly entitled to an injunction to restrain the defendants from proceedings to arbitration pursuant to the usual arbitration clause contained in the contract. The defendants traversed all the material allegations in their written statement. The only issue raised in the Court below was, whether the plaintiffs were liable on the contract. Mr. Justice Greaves, on the evidence adduced, came to the conclusion that the plaintiffs did not enter into the contract and that the same was not binding on them; he accordingly granted an injunction restraining the defendant from proceeding with the arbitration before the Bengal Chamber of Commerce.

On the present appeal, it has been argued that the plaintiffs, on the face of the plaint, were not entitled to the relief claimed by them. This point was not taken in the Court below and does not appear to have been raised in the memorandum of appeal presented to this Court. On behalf of the respondents, it has been argued that the point should not be allowed to be raised for the first time here. We cannot accede to this contention, because although the question cannot strictly be deemed as one of jurisdiction in the sense of competency of the Court to entertain the suit, still the objection goes to the root of the matter and raises the question whether the Court was competent to grant the relief claimed by the plaintiffs. If the Court was not competent to grant the injunction claimed by the plaintiffs, it is manifest that the decree for injunction should not be allowed to stand, merely because the point was overlooked and neither raised in the Court below nor mentioned in the memorandum of appeal presented to this Court. That the Court of appeal cannot avoid the decision of a pure question of law, of this character, which does not depend on the determination of a question of fact, and, which, besides, disputes the authority of the Court to make an order of a certain description, is clear from the decisions

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of the Judicial Committee in *Meenakshi* v. *Subramaniya* (1), and *Connecticut Fire Insurance Co.* v. *Kavanagh* (2).

In the plaint the plaintiffs asked for the following reliefs: "For a declaration that the plaintiffs did not enter into the said alleged contract, and the same is not binding on them, for a declaration that there was no submission to arbitration by the plaintiffs, and for an injunction restraining the defendant firm, its servants and agents from proceeding with the said arbitration before the Bengal Chamber of Commerce Tribunal of Arbitration." It is plain that this is not a suit for a mere declaration of title without consequential relief, within the meaning of section 42 of the Specific Relief Act. Consequently, no question arises as to the scope of that section, as explained in the judgment of Sir Lawrence Jenkins C. J. in the case of *Deokali Koer* v. *Kedar Nath* (3). The suit is in essence one for a perpetual injunction and the prayers for declaration are merely ancilliary thereto. Thus the fundamental question for determination is, whether the Court was competent to grant the injunction sought for by the plaintiffs.

Now, as was pointed out by Sir Arthur Wilson in the case of *Tituram Mukerji* v. *Cohen* (4), "The right to an injunction depends, in India, upon statute and is governed by the provisions of the Specific Relief Act." We must therefore examine the provisions of Chapters IX and X of the Act. Chapter IX is headed 'Of Injunctions generally.' Section 52, the first of the sections contained in Chapter IX, states that preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual. Section 53 next defines the injunctions as of two classes. The second paragraph, which is devoted to perpetual injunctions, lays down that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit. The defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an act, which would be contrary to the rights of the plaintiff. This provision consequently defines the mode in which a perpetual injunction can be granted and its restraining effect on the defendant when it has been granted. The next Chapter is headed 'Of Perpetual Injunctions' and opens with section 54, which defines when perpetual injunctions can be granted. The first paragraph of the section lays down that, subject to the other provisions contained in, or referred to by this Chapter, a per-

(1) (1887) L. R. 14 I. A. 160; I. L. R. 11 Mad. 26.
(2) (1892) A. C. 473 (480). (3) (1912) I. L. R. 39 Calc. 704.
(4) (1905) I. L. R. 33 Calc. 203; L. R. 32 I. A. 185; 2 C. L. J. 408.

petual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. The next two paragraphs deal with two distinct classes of cases, namely, first, the case when the obligation arises from contract, and secondly, the case when the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property. In the former class of cases, the principle is formulated that the Court shall be guided by the rules and provisions contained in the second Chapter of the statute. In the latter class of cases, it is stated that the Court may grant a perpetual injunction in five specific categories of events. Mr. Bose, for the respondents has not seriously contended that the prayer for injunction in the present litigation can be brought within the scope of section 54. This is fairly clear from the opening and controlling paragraph of the section, which provides that in order to entitle a litigant to a perpetual injunction, he must establish that the injunction is required to prevent a breach of an obligation. The term 'obligation' is defined in section 3 to include every duty enforceable by law, so that when a legal duty is imposed on one person in respect to another, that other is invested with the corresponding legal right. The first paragraph of the section thus establishes the broad and general rule that given the breach of an existing legal right which is vested in the applicant, the breach thereof may be restrained by injunction. This is an elementary principle, for as Lord Kingsdown said in *Imperial Gas Light and Coke Co.* v. *Broadbent*(1), when a plaintiff applies for an injunction to restrain a violation of an alleged right, if the existence of the right be disputed, he must establish that right before he gets the injunction to prevent the recurrence of its violation. We accordingly invited the learned counsel for the respondents to formulate the precise obligation of which there had been a breach in the case before us. But he was unable to show that there was any legal right in the plaintiffs which had been violated or had been threatened with violation by the defendant. Consequently, it is plain that no injunction can be claimed under section 54. Mr. Bose was thereupon constrained to invoke the aid of the second paragraph of section 53; he argued in substance that the right to an injunction must be determined by reference to the provisions of section 53 and that the provisions of section 54 should be treated as merely illustrative. We are of opinion that there is no foundation for this contention. Sections 54 and 56 must be read together, as supplementing each other. The former defines the circumstances under which perpetual injunctions

(1) (1859) 7 H. L. C. 600 (612).

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may be granted; the latter enumerates the cases where an injunction must not be granted. It would, in our opinion, be an erroneous construction of the statute to hold that the right to an injunction should be determined independently of the provisions of sections 54 and 56, by reference to the terms of section 53. As we have already stated, the injunction in this case cannot be claimed under the provisions of section 54. We are further of opinion that the injunction claimed should not be granted in view of the provision of clause (i) of section 56 which lays down that an injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding (except in case of breach of trust). In the case before us, the respondents allege that they did not enter into the alleged contract. If that case is well-founded, the arbitration proceedings before the Bengal Chamber of Commerce, even if they result in an award, can only terminate in an award which would be a nullity and could not possibly affect the rights of the plaintiffs; if the arbitrators make an award in favour of the defendant, (which itself is doubtful), the plaintiffs will have ample opportunity to protect themselves by an appropriate proceeding. We are clearly of opinion, on all these grounds, that the injunction claimed cannot be granted.

Reference was made on behalf of the appellant to the decision in *North London Railway Coy.* v. *Great Northern Railway Coy.* (1), which was followed by Rankin, J. in *Sardarmull* v. *Agar Chand* (2), in support of the view that when the contract is denied, the Court will not grant an interlocutory injunction to restrain arbitration proceedings which, according to the applicant, would be null and futile. On behalf of the respondents, reliance was placed on the earlier decisions of Sir George Jessel in the cases of *Beddow* v. *Beddow* (3); *Malmsbury Railway Coy.* v. *Budd* (4), and *Aslatt* v. *Corporation of Southampton* (5), which were all reviewed in the case of *North London Railway Coy.* v. *Great Northern Railway Coy.* (1). It is not necessary for us to deal with these cases, because, as we have already pointed out, the authority of the Court to grant an injunction in the present case depends on the true construction of the provisions of the Specific Relief Act.

The result is that this appeal must be allowed and the suit dismissed. We direct that the plaintiffs respondents do pay to the

(1) (1883) 11 Q. B. D. 30.
(2) (1919) 23 C. W. N. 811.
(3) (1878) 9 Ch. D. 89.
(4) (1876) 2 Ch. D 113.
(5) (1880) 16 Ch D. 143.

defendant appellant the costs of this appeal as also the costs of hearing for two days in the trial Court.

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Fletcher, J.—I agree.

Messrs. Pugh & Co.: Attorneys for the Appellant.

Messrs. Fox & Mandal: Attorneys for the Respondents.

A. T. M. *Appeal allowed*: *Suit dismissed.*

CRIMINAL REVISION.

Before Sir Asutosh Chaudhuri, Knight, Judge, and Mr. Justice Newbould.

JAGANNATH AGARWALLA

v.

THE EMPEROR.*

CRIMINAL.
1920.
January, 16, 30.

Search warrant—Examination of petitioner—Record—Criminal Procedure Code (Act V of 1898), Sec. 96—'An enquiry about to be made'—'Investigation.'

Per Chaudhuri, J.: Although there is no express provision requiring a Magistrate to make a record or keep notes of examination of a petitioner for search warrant, some record should be kept to enable the appellate Court to form an opinion as regards the materials upon which the Magistrate acted.

A Magistrate is not relieved from his duty by stating that he believed that the officer had formed a correct opinion.

An order under section 96 of the Criminal Procedure Code cannot be made to further a police investigation which may or may not result in an enquiry.

Per Newbould, J.: Section 96 of the Criminal Procedure Code empowers a Magistrate to issue a search warrant before any proceedings of any kind are initiated and in view of an enquiry about to be made.

The expression "An enquiry about to be made" does not include every investigation.

Application for revision under section 435 of the Criminal Procedure Code.

A search warrant was issued in premises No. 402 Upper Chitpore Road in the dwelling house of the petitioner and books and papers were seized.

* Criminal Revision No. 35 of 1920, against an order of D. Swinhoe Esq., Chief Presidency Magistrate of Calcutta, dated the 21st December, 1919.

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v.
The Emperor.

January, 30.

Mr. Langford James and *Babu Manmatha Nath Mukherjee* for the Petitioner.

Hon'ble Mr. T. C. P. Gibbons (*The Advocate-General*) and *Babu Monindra Kumar Bose* for the Opposite Party.

C. A. V.

The judgments of the Court were as follows:

Chaudhuri J.—Search warrants were issued on the 21st December, 1919 in this and other cases by the Chief Presidency Magistrate under section 96 Criminal Procedure Code on the application of Mr. Armstrong, an officer deputed by the Government of India to investigate into some alleged fraudulent transactions brought to its notice by the Comptroller, Munitions Board, Bengal Circle. We have dealt with the warrant which was issued against one Mr. Pratt. We found that it was not justified under section 96 of the Criminal Procedure Code. The same ruling would have covered this case had it not been for the explanation which the Magistrate has now submitted which differs on material points from the explanation then submitted. The learned Magistrate now says that he acted upon the petition coupled with the statements made by Mr. Armstrong which he says he had every reason to believe and act upon. No reference to any statement made by Mr. Arstrong was made or even alluded to when he submitted his first explanation. All the search warrants were issued at the same time and we understand upon the same materials. The matter is one of very recent date and it is strange that the Magistrate omitted in the first case to mention that any statement was made by Mr. Armstrong when he presented his petition, if such statement taken with the allegations in the petition was the basis of his order.

When Mr. Pratt's matter was heard the two lists referred to in paragraph 12 of the petition were not on the record After the Rule was issued in this case Mr. Armstrong it appears put in a petition before the Magistrate on the 13th January, 1920, paying for the incorporation of copies of those lists certified by him as correct, if the originals could not be found. There is no explanation what has happened to them. These lists, according to Mr. Armstrong gave details of purchases made by Mr Waite of materials for stock as also of materials against indents from various firms having dealings with the Munitions Board after his power of purchase was withdrawn: "that these were very material adjuncts to his application for the issue of search warrants as furnishing materials showing the necessity of inspection of the books of the firms mentioned in his petition." In neither of these two lists the name of the present firm occurs. Mr. Armstrong has filed an affidavit before us in which he

says that when he began inspection of the record of the Munitions Board he came across several transactions which he had every reason to suspect were fraudulent and dishonest in their character and which clearly pointed to the commission of criminal offences by several persons independently and acting in concert. "That as a preliminary to sending up a case for enquiry before the Magistrate he found it very necessary to examine and inspect the books of the various firms and persons which had dealings with the Munitions Board and which were suspected of being concerned in the fraudulent transactions: that accordingly on the 21st December, 1919, he applied for search warrants to search and inspect the books of the several firms including the firm of Jagannath Agarwalla." He also says "that when he handed his petition for search warrants he also handed over the two lists abovementioned and that at the time he handed them over the Chief Presidency Magistrate questioned and examined him about the contents of his petition and *inter alia* specifically asked him if the various firms and persons set out at the end of his petition were firms and persons who had dealings with the Munitions Board, which from his investigation he had reason to suspect were dishonest and fraudulent and he answered the same in the affirmative." It is very unfortunate that no record of this examination has been kept. No doubt there is no express provision requiring the Magistrate to make a record or keep notes of such examination, but it has been repeatedly pointed out by this Court that some record ought to be kept to enable us to form an opinion as regards the materials upon which the Magistrate acted. Mr. Armstrong says nothing more in his affidavit than that he told the Magistrate that he suspected that the dealings of the firms and persons named in his petition were dishonest and fraudulent. It is not the Investigating Officer's suspicion we are concerned with. The Magistrate has to form his own opinion upon the materials placed before him. He is not relieved from his duty by stating that he believed that the officer had formed a correct opinion. We have nothing more than a vague statement from Mr. Armstrong which seems to me to be quite inadequate for an order under section 96.

The learned Advocate-General was not quite able to make up his mind whether an enquiry was being made or not when the warrant was issued, but we understood him finally to say that we might take it that no enquiry was being made but he submitted that section 96 was applicable, whether an enquiry was about to be made or not. The Magistrate however says that an order "was necessary for purposes of the enquiry which Mr. Armstrong's investi-

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gation was likely to lead up to", but that is not what in my opinion the section contemplates. I do not think that an order under section 96 can be made to further a police investigation which may or may not result in an enquiry. The form of the search warrant in the Code refers "to an enquiry now being made or about to be made" There are separate provisions in the Code for investigation and large powers are given to the police in cognizable cases for seizure of documents. The word "investigation" is defined in the Code and is differentiated from an enquiry. Chapter XIV Criminal Procedure Code has nothing to do with the proceedings we are now dealing with.

I think the order for the search warrant in this case was made without sufficient consideration of the requirements of the section and upon inadequate materials and ought to be set aside. I hold that the materials upon which such an order is made ought to be placed on the record. While setting aside the order I need hardly add that it will not preclude a further application for production of the books on proper materials.

My learned brother has not agreed with my views, but agrees with me in ordering that the Rule be made absolute and that the books be returned. Ordered accordingly.

Newbould, J.—From the explanation submitted by the Chief Presidency Magistrate and the affidavit of Mr. Armstrong it appears that the Chief Presidency Magistrate satisfied himself by enquiries from Mr. Armstrong that the issue of this search warrant was necessary. He did not issue it on the bare statement in Mr. Armstrong's petition that the issue of search warrants against the persons named was necessary. He had materials before him on which he considered the purpose of an enquiry would be served by a general search or inspection. I am unable to hold that in coming to this conclusion he did not properly exercise his judicial discretion.

Section 96 of the Criminal Procedure as explained by the Judicial Committee of the Privy Council in *Clarke* v. *Brajendra Kishore Roy Chowdhury* (1), empowers a Magistrate to issue a search warrant before any proceedings of any kind are initiated and in view of an enquiry about to be made. The learned counsel for the petitioner contends that no enquiry was about to be made when this search warrant was issued and draws our attention to a remark in Mr. Armstrong's petition that "an enquiry is now being made." Having regard to the interpretation given to the words "enquiry" and "investigation" in clauses (*k*) and (*l*) of section 4 Criminal Procedure

(1) (1912) I. L. R. 39 Calc 953; 16 C. L. J. 231.

Code; this appears to have been incorrect and Mr. Armstrong should have called an investigation and not an enquiry. I think a distinction must be drawn between "an enquiry about to be made" and "an investigation that is being made" and that the former expression does not include every investigation. But in the present case the allegations in Mr. Armstrong's petition were so serious that the Magistrate could have no doubt that he would have to hold a judicial enquiry. Further it has been brought to our notice that a regular judicial proceedings has since been instituted. I therefore hold that the contention fails that there was an absence of jurisdiction to issue the search warrant because no enquiry was about to be held. The Chief Presidency Magistrate had power to issue the search warrant and it has not been shown that the judicial discretion was improperly exercised.

Though with regret I differ from the view taken by my learned brother, I do not refuse to sign the order which he proposes to make. The subsequent proceedings in the similar case of Mr. Pratt show that it will still be open to the authorities to obtain these documents if necessary by an applicaton under section 94 Criminal Procedure Code, and the balance of convenience will be served by finally disposing of this case now. A difference as to the order to be passed would require a rehearing of the case before a third Judge.

I agree in the order of my learned brother but not in the reasons given by him for that order.

The Rule is made absolute and the order of the lower Court is set aside.

A. T. M. *Rule made absolute.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Sir Ernest Edward Fletcher, Knight, Judge.

CIVIL.
1920.
February, 6, 17.

KRISHNA KISHORE DE

v.

AMAR NATH KHETTRY AND ANOTHER.*

Sub-mortgage—Leave to sue—Letters Patent, cl. (12)—Mortgagor's property situate in the mofussil—Mortgagee's property situate in the town—One suit to realise the sub-mortgagee's dues—Decree ordering sale of mortgagor's property, if valid—Sub-mortgagee, rights of—Jurisdiction, want of—Res judicata—*Civil Procedure Code (Act V of 1908), section 11.*

Under clause 12 of the Letters Patent, the High Court, in the exercise of its ordinary Original Civil Jurisdiction, is not competent to grant leave to sub-mortgagee to sue for enforcing right of sale of mofussil properties under the mortgage of the original mortgagor. A decree obtained in such suit by the sub-mortgagee after obtaining leave to sue, in so far as it affects properties in the mofussil, is without jurisdiction; *Harendra Lal* v. *Haridasi* (1) referred to.

If the decision of the Court is void for want of jurisdiction over the subject matter, it cannot operate as *res judicata*; in order that a judgment may be conclusive between the parties, the essential pre-requisite is that it should be the judgment of a Court of competent jurisdiction within the meaning of section 11 of the Code of Civil Procedure.

Where a Court has no jurisdiction over the subject matter of the action in which an order is made, such order is wholly void, for jurisdiction cannot be conferred by consent of parties, and no waiver or acquiescence on their part can make up for the lack or defect of jurisdiction: *Rajlakshmi* v. *Kaiyayani* (2); *Gurdeo* v. *Chandrikah* (3), and *Ranjit* v. *Ramudar* (4) referred to.

Where a Court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give its jurisdiction over the case, the decision is conclusive till it is set aside in an appropriate proceeding. But where there has been no such adjudication, the decree remains a decree without jurisdiction and cannot operate as *res judicata*.

A sub-mortgagee is entitled to bring a suit against his mortgagor and to realise the dues on his mortgage by sale or foreclosure: *Ram Shankar Lal* v. *Ganesh* (5), and other cases referred to. It is also open to a sub-mortgagee, but by no means obligatory on him, to frame his suit in such a way as not only to enforce his

* Appeal from Original Civil No. 30 of 1919, against the decision of Mr. Justice Greaves, dated the 4th April, 1919.

(1) (1914) L. R. 41 I. A. 110; I. L. R. 41 Calc. 972; 19 C. L. J. 484.
(2) (1910) I. L. R. 38 Calc. 639.
(3) (1907) I. L. R. 36 Calc. 193; 5 C. L. J. 611.
(4) (1912) 16 C. L. J. 77; 17 C. W. N. 116.
(5) (1907) I. L. R. 29 All. 385.

rights under his own mortgage, but to enforce the original mortgage against the mortgagor of his mortgagor: *Zabi* v. *Deo Nath* (1) referred to. A sub-mortgagee may thus be content to cut off the equity of redemption of his mortgagor, or he may at his choice, by a suit properly framed, cut off the equity of redemption not merely of his mortgagor but also of the mortgagor of his mortgagor.

Where a mortgagee transfers his interest by way of a mortgage, his mortgagee, that is, the sub-mortgagee takes it subject to the original mortgagor's right to redeem; consequently, the sub-mortgagee who holds a fragment of the interest of the mortgagee may achieve what the mortgagee might have obtained, namely, to cut off the equity of redemption of the original mortgagor.

When the properties included in the original mortgage are situated in the mofussil and the additional property included in the security granted by the mortgagee is situated in the town of Calcutta, the mortgagee, by the grant of a sub-mortgage along with a mortgage of property in the town of Calcutta, is not entitled to have the *forum* altered in relation to the enforcement of the original mortgage. As between the mortgagee and the sub-mortgagee, a suit to enforce the security should be instituted on the Original Side of the High Court. As the sub-mortgagee derives his title from his own mortgagor in respect of the mofussil property, he can do neither more nor less than what his mortgagor could have done towards the original mortgagor. The original mortgagor could be sued by his mortgagee in respect of liabilities arising out of the mortgage transaction only in the mofussil Court.

Appeal by the Plaintiff.

Suit to declare the invalidity of the decree in a mortgage suit in so far as such decree affects land situated beyond the local limits of the Ordinary Original Civil Jurisdiction of the High Court.

The material facts appear from the judgment dismissing the plaintiff's suit, of Mr. Justice Greaves, which was as follows:

1919.
April, 4.

Greaves, J.—This is a suit by the plaintiff to set aside a mortgage decree dated and September 1914 and another decree dated the 24th August 1917 in suit No. 1083 of 1912 on the ground that the Court had no jurisdiction to pass the decrees that were passed in that suit. In opening the case counsel for the plaintiff stated that he did not desire to proceed against the infant defendants and accordingly any order that will be passed in the suit will not affect the infant defendants.

On the 30th August 1907 a mortgage was executed by defendants Nos. 4, 5, 6 and 9 in favour of defendant No. 3 in respect of an eleven annas share in two properties situated in the mofussil in the district of Howrah known as Santoshpur and Mandalika. The mortgage is in the ordinary form of a Bengali mortgage and it states that the defendants 4, 5, 6 and 9 had borrowed from the 3rd defendant a sum of Rs. 25,000 on a mortgage of their right in the eleven

(1) (1909) 10 C. L. J. 470.

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annas share of lots Santoshpur and Mandalika. As is usual in Bengali mortgages there is no grant or conveyance of the 11 annas share in Santoshpur and in Mandalika. On the 23rd September 1911 the mortgagors redeemed the Mandalika property. On the 13th December 1907 the 3rd defendant mortgaged to the 1st and 2nd defendants his one-third share in two houses in Calcutta and also sub-mortgaged to the defendants 1 and 2 his interest in the mortgage of the 30th August 1907. It appears from the document that Haridas Banerjee, defendant No. 3, assigned to Sunder Dass Khettry and Bholanath Khettry (who are defendants Nos. 1 and 2) or the survivor of them and their or his heirs, executors, administrators and assigns all the said principal sum of Rs. 25,000 due and owing to Haridas Banerjee upon the security of the mortgage of the 30th August 1907 together with all interest thereon and further interest to become due, and the benefit of the covenants, powers and provisions therein contained for securing the same, and all the right, title, interest, claim and demand of Haridas Bannerjee into and upon the premises thereby assigned and every part thereof together with full power to demand, sue for, recover and receive the principal sum of Rs. 25,000 and interest. On the 25th November 1912 defendants 1 and 2 commenced a suit No. 1083 of 1912, to enforce the mortgage of the 13th December 1907, and they obtained prior to the institution of the suit leave under clause 12 of the Charter. On the 2nd September 1914 a preliminary decree was passed in that suit and no body appeared except the infant defendants who appeared by their guardian *ad litem* and submitted their interest to the Court. I should here state that defendant No. 10 is a puisne mortgagee by virtue of a mortgage of the 13th February 1915. On the 30th June 1916, the equity of redemption in Santoshpur was purchased in the name of Jnanendra Kumar Bose as benamidar for the present plaintiff, and on the 25th January 1917 Jnanendra executed a declaration that he had purchased the property as benamidar for the present plaintiff. On the 24th May 1917 the present plaintiff and defendant No. 10 were made parties in suit No. 1083 of 1912, and on the 14th August 1917 a decree absolute was made in that suit. I am told by counsel for the plaintiff, and I accept his statement, that at that time notice was brought to the Court of the facts upon which the present suit is founded but that I declined to stay the passing of the decree absolute on that day and referred the plaintiff to a suit. The present suit is therefore brought to set aside both the preliminary decree and the decree absolute passed in suit No. 1083 of 1912 on the ground that the Court had no jurisdic-

tion to deal with the suit and that there was no jurisdiction in this Court to give leave under clause 12 of the Charter having regard to the circumstances of the case.

The following issues were raised.

1. Having regard to the prayer (c) to the plaint is the suit maintainable in its present form?

2. Is the plaintiff entitled to have the decree of the 2nd September 1914 and the decree of the 24th August 1917 passed in suit No. 1083 of 1912 and the order of the 24th May 1917 passed also in that suit set aside? and

3. To what relief, if any, is the plaintiff entitled? A further issue was raised, namely, are the Khettry defendants guilty of fraud and collusion as alleged in the plaint? And has the plaintiff any cause of action against these defendants? But the charges contained in paragraphs 15 and 17 of the plaint of fraud and collusion against the Khettry defendants being withdrawn, this issue was not persisted in.

Now, the real question that arises in the suit is whether there was jurisdiction in this Court to grant leave under the clause 12 of the Charter so that the suit could extend as well as to the Calcutta properties which were comprised in the mortgage of the 13th December 1907 as to the Sontoshpur property in Howrah outside the jurisdiction of this Court. The main argument raised before me was this, that some limit must be placed upon the provisions of the clause 12 of the Charter, and that although it may be that the Court has jurisdiction, if leave is given, to entertain a suit in respect of property both in Calcutta and in the Mufussil, such a suit cannot be entertained where, as in the present case, the property sub-mortgaged is in the mofussil. It is said that the original contract between the parties who entered into the Bengali mortgage of the 30th August 1907, relating as it did only to mofussil properties, contemplated that any suit to enforce that mortgage should be brought in the district of Howrah, and that it is inequitable on defendants 4, 5, 6 and 9 who were the mortgagors in that mortgage that by virtue of the sub-mortgage they should be forced to appear in this Court whereas according to their original bargain they could not have been sued here but only in the Howrah Court. And it was faintly argued before me that upon the construction of clause 12 of the Charter, there is no jurisdiction to give leave where part of the property is situate outside the jurisdiction, it being desired to limit clause 12 of the Charter so far as leave is concerned, to what are described in that clause as "all other cases." So far as this second point is

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concerned, I think it is too late in the day now to raise it and that by various decisions of this Court it has been held that the question of leave applies as well to a suit for land where part of the property is situate within the jurisdiction and part without as to "all other cases" referred to in clause 12.

So far as the other point is concerned, there appears to be no direct authority on the point. But it seems to me that by virtue of the mortgage of the 13th December 1907 I can only deal with the question as being a mortgage of Calcutta properties and also of mofussil properties and that the same principles apply as apply to other cases where leave has been obtained where the suit extends to land outside Calcutta as well as to land in Calcutta and within the jurisdiction of this Court, and I am not prepared to make the limitation which I am asked to make upon the provisions of clause 12 of the Charter and to say that that must be read subject to a proviso that leave shall not be given in a case like the present where the property outside the jurisdiction of the Court is comprised in a mortgage by way of a sub-mortgage. I think that this really disposes of the main questions that arise in the suit and I do not think it is necessary for me to refer in detail to some of the authorities to which I was referred. As I have already stated, so far as the main point is concerned, there is no express authority and none of the authorities to which I have referred are really helpful with regard to that point.

On behalf of defendants 1 and 2, a further point was raised. It is said that inasmuch as the plaintiff bought *pendente lite* he is bound by any order that is passed in the suit whether that order is right or wrong and that it is not open to him, as he is a purchaser *pendente lite*, to question the correctness or the validity of any order made prior to his purchase. I do not think that I am prepared to assent to that proposition because I think that if the plaintiff were right in his present contention then the leave that was given under clause 12 of the Charter was wrong and the suit was really a nullity.

Two other points were urged but not pressed on behalf of the plaintiff. It is said that credit has not been given for a sum of Rs. 1,651 referred to in the plaint in taking the mortgage accounts. But no evidence was tendered before me upon this point and it was open to the parties when the account was taken to have urged this contention. They did not chose to urge that contention then nor have they chosen to adduce evidence on the point before me; under these circumstances, I cannot now go into that matter.

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The final point that was raised was with regard to the question of the guardianship of the two minor defendants in suit No. 1083 of 1912. It is said that they had a certificated guardian, their mother, appointed by the Alipore Court and that under these circumstances she was the proper person and not an attorney to be their guardian-ad-litem in the suit. But a reference to the order of the 20th February, 1914, appointing the guardian *ad litem* and to the petition upon which that order was founded shows that it was brought to the notice of the Court that the infants had a certificated guardian and that a letter has been written to her asking her whether she was prepared to appear in the suit as the guardian *ad litem* of the infant defendants and that unless she was prepared to do so an application would be made to the Court to appoint as the guardian *ad litem* of the infants some officer of the Court. It is in evidence that no reply was made to that letter. It seems to me that it is not now open to the plaintiff here who has not elected to call any evidence on the point to question the correctness of the order of appointment of the guardian *ad litem* of the 20th February 1914. This disposes of all the questions that arise in the suit, and in the result, the suit fails and must be dismissed with costs on scale No. 2.

Against this decision, the plaintiff appealed.

Messrs. M. N. Bose, Pugh and *H. D. Bose* for the Appellant.

Messrs. Sarcar and *S. C. Chakrabarty* for the Respondents.

C. A. V.

The judgments of the Court were as follows:

February, 17.

Mookerjee, J.—This is an appeal by the plaintiff in a suit to declare the invalidity of the decree in a mortgage suit in so far as such decree affects land situated beyond the local limits of the Ordinary Original Civil Jurisdiction of this Court, on the ground that leave under Clause 12 could not have been granted and the decree was consequently to that extent made without jurisdiction. The question raised is of first impression, and the facts material for its determination are not in controversy.

On the 30th August, 1907, certain persons who may be called the Mookerjees and their trustee, one Bhattacharyya (represented by defendants Nos. 4-9 in the present litigation), executed a simple mortgage in favour of Banerjee (defendant No. 3), to secure the repayment of a loan of Rs. 25,000, which was charged upon a share of lots Santoshpore and Mandalika, Patni Mahals in Sub-district Howrah within the district of Hughli. On the 13th December

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1907, Banerjee executed a mortgage in favour of the Khettrys (represented by defendants Nos. 1 and 2) to secure a loan of Rs. 10,000. The properties conveyed and assured by this mortgage included a share of two parcels of land in the town of Calcutta as also the interest of Banerjee as mortgagee under the document of the 30th August, 1907. On the 23rd September, 1911, the patni taluk Mandalika was released and absolutely discharged from the mortgage of the 30th August, 1907, upon payment of Rs. 10,000 by the original mortgagors and with the concurrence of all the parties interested. On the 25th November, 1912 the Khettrys instituted a suit (No. 1083 of 1912) on the Original Side of this Court to enforce their security of the 13th December 1907 against Banerjee, the Mookerjees and Bhattacharyya. It is necessary to observe that the suit was brought by the Khettrys, not only against their mortgagor Banerjee, but also against the mortgagors of Banerjee under the transaction of the 30th August, 1907. The reason for this was that the Khettrys sought, not merely to enforce their security against their mortgagor Banerjee and to cut off his equity of redemption under the mortgage of the 13th December, 1907, but also to enforce the mortgage held by Banerjee against the Mookerjees and Bhattacharyya under the deed of the 30th August, 1907; this relief they claimed under their derivative title from Banerjee who had granted a mortgage of his interest as mortgagee. The suit was thus in essence a composite suit wherein two distinct reliefs were claimed by the Khettrys, namely, first, to enforce a right of sale of Calcutta properties under the mortgage of the 13th December, 1907, and, secondly, to enforce a right of sale of mufassil properties under the mortgage of the 30th August, 1907. The Khettrys, accordingly, prayed for and obtained leave under clause 12 of the Letters Patent on the assumption that the clause was applicable. The suit was decreed *ex parte* on the 2nd September, 1914, and the preliminary decree then passed was made absolute on the 24th August, 1917. Meanwhile, the plaintiff De had purchased the right, title and interest of the Mookerjees and Bhattacharyya at an execution sale on the 20th June, 1916, and on the 29th July, 1918, he instituted the present suit to impeach the validity of the decree in the suit of the Khettrys in so far as it affected land beyond the local limits of the Ordinary Original Civil Jurisdiction of this Court. Mr. Justice Greaves has held that the Court was competent to grant leave under clause 12 and that the decree was consequently made with jurisdiction.

It is now well-settled by decisions in all the Indian High Courts

that a sub-mortgagee is entitled to bring a suit against his mortgagor and to realise the dues on his mortgage by sale or foreclosure: *Ram Shankar Lal* v. *Ganesh Prasad* (1); *Mutku* v. *Venkata* (2); *Narayan* v. *Ganoji* (3); *Bansi Lal* v. *Durga Prasad* (4). It is also open to a sub-mortgagee, but by no means obligatory on him, to frame his suit in such a way as not only to enforce his rights under his own mortgage, but to enforce the original mortgage against the mortgagor of his mortgagor: *Zaki Hasan* v. *Deo Nath* (5). A sub-mortgagee may thus be content to cut off the equity of redemption of his mortgagor, or he may at his choice, by a suit properly framed, cut off the equity of redemption not merely of his mortgagor but also of the mortgagor of his mortgagor. This he is able to accomplish by reason of his derivative title. Where a mortgagee transfers his interest by way of a mortgage, his mortgagee, that is, the sub-mortgagee takes it subject to the original mortgagor's right to redeem; consequently, the sub-mortgagee who holds a fragment of the interest of the mortgagee may achieve what the mortgagee might have obtained, namely, to cut off the equity of redemption of the original mortgagor. The form of the decree to be made in such a suit, where two-fold relief is claimed by the sub-mortgagee against his mortgagor and the mortgagor of that mortgagor is set out in Seton on Judgments (1912) p. 2009 (Derivative Mortgagee v. Mortgagee and Mortgagor) and the Code of Civil Procedure, Appendix D, Form 9. No difficulty arises in a suit of this description when the properties included in the original mortgage as also the additional properties, if any, comprised in the mortgage by the mortgagee are situated within the same jurisdiction. Where, however, as here, the properties comprised in the original mortgage are situated in the mufassil and the additional property included in the security granted by the mortgagee is situated in the town of Calcutta, an important question of some nicety arises. The original contract of mortgage plainly contemplates a suit in the mufassil Court for its enforcement. Is the mortgagee, by the grant of a sub-mortgage along with a mortgage of property in the town of Calcutta, entitled to have the forum altered in relation to the enforcement of the original mortgage. We are clearly of opinion that the answer should be in the negative. As between the mortgagee and the sub-mortgagee, a suit to enforce the security may fittingly be instituted on the Original Side of this Court; this is in

(1) (1907) I. L. R. 29 All. 385.
(2) (1896) I. L. R. 20 Mad. 35.
(3) (1891) I. L. R. 15 Bom. 692.
(4) (1908) 9 C. L. J. 429.
(5) (1909) 10 C. L. J. 470.

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conformity with the intention of the parties as indicated by the inclusion of the Calcutta property in the mortgage. If, however, the sub-mortgagee is not content with relief against his mortgagor alone and claims to have a remedy against the mortgagor of his mortgagor, the situation becomes entirely changed. As he can claim this relief only by virtue of title derived from his own mortgagor in respect of the mufassil property, he can do neither more nor less than what his mortgagor could have done towards the original mortgagor. The original mortgagor, as we have seen, could have been sued by his mortgagee in respect of liabilities arising out of the mortgage transaction, only in the mufassil Court. The mortgagee, by granting a mortgage to a third person, of his interest as mortgagee and by including in that document a property in Calcutta cannot be permitted to prejudice the position of his mortgagor and to render him liable to be sued in a Court never contemplated by the parties at the time of the mortgage contract. We are of opinion that this view is consistent with a plain reading of clause 12 of the Letters Patent which, so far as it is material for our present purpose, provides as follows:

"The said High Court of Judicature at Fort William in Bengal in the exercise of its Ordinary Original Civil Jurisdiction shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immovable property, such land or property shall be situated, or, in all other cases, if cause of action shall have arisen either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the Ordinary Original Jurisdiction of the said High Court."

In the case before us, the Khettrys, as derivative mortgagees from Banerjee, could enforce the security of the 30th August, 1907, against the Mookerjees, and Bhattacharyya, just as Banerjee himself might have done, in the mufassil Court. The Khettrys might also, as the mortgagees of Banerjee, have sued him alone on the Original Side of this Court and barred his equity of redemption. But the Khettrys plainly could not be allowed, by the inclusion of two claims in one suit against two sets of persons in respect of properties situated, as regards one set in the mufassil alone, make the composite suit against both sets of defendants maintainable on the Original Side of this Court. The decisions in *Matigara Coal Co.* v. *Shragers* (1), and *Sarat Chandra* v. *Nakapiet* (2), are of no avail to the Khettrys; they merely show that where some of the mortgage-

(1) (1911) I. L. R. 38 Calc. 824.
(2) (1910) I. L. R. 37 Calc. 907 (911).

ed properties included in the mortgage deed are within and some without the local limits of the Ordinary Original Civil Jurisdiction of the Court, the Court has jurisdiction to grant leave to sue and to entertain a suit on the mortgage in respect of all the properties including those situated beyond the local limits. This principle might be of assistance to the Khettrys in a suit by them against Banerjee alone on the mortgage of the 13th December, 1907, which included properties in the town of Calcutta as also mortgagee-interest in property in the mufassil. But there is no foundation for the argument that the suit as framed could properly be treated as one to enforce a cause of action which had arisen partly within the local limits of the Ordinary Original Civil Jurisdiction; the contention is fallacious, as the causes of action under the mortgage of the 30th August, 1907, and 13th December, 1907, were distinct and affected different sets of individuals, of whom one set held properties situated entirely in the mufassil. We do not think it would be right to strain the language of clause 12 of the Letters Patent with a view to cover a case of this description. There is thus no escape from the conclusion that the Court was not competent to grant leave under that clause, and the decree, in so far as it affects properties in the mufassil, must be deemed made without jurisdiction (cf. the judgment of Lord Moulton in *Harendra Lal* v. *Haridasi* (1).

As a last resort, it was faintly argued on behalf of the respondents that the objection as to jurisdiction might and should have been raised in the original suit, and as it was not so raised, the rule of constructive *res judicata* should be applied, in other words, that the parties should be placed in the same position as if the point had been raised, contested and determined in favour of the Khettrys. There is obviously no foundation for this contention. It is an elementary principle that where a Court has no jurisdiction over the subject matter of the action in which an order is made, such order is wholly void, for jurisdiction cannot be conferred by consent of parties, and no waiver or acquiescence on their part can make up for the lack or defect of jurisdiction. If any authority were needed to support this proposition, reference might be made to the recent decisions in *Rajlakshmi* v. *Katyayani* (2); *Gurdeo* v. *Chandrikah* (3) and *Ranjit* v. *Ramudar* (4), where the earlier cases will be found reviewed. But if the decision of the Court is void for want

(1) (1914) L. R. 41 I. A. 110; I. L. R. 41 Calc. 972; 19 C. L. J. 484.
(2) (1910) I. L. R. 38 Calc. 639.
(3) (1907) I. L. R. 36 Calc. 193; 5 C. L. J. 611.
(4) (1912) 16 C. L. J. 77; 17 C. W. N. 116.

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of jurisdiction over the subject matter, it cannot operate as *res judicata*; in order that a judgment may be conclusive between the parties, the essential pre-requisite is that it should be the judgment of a Court of competent jurisdiction within the meaning of section 11 of the Civil Procedure Code. In this case, as already stated, the question of jurisdiction was neither raised nor decided; the position might have been different if the question had been raised and decided, for where a Court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction over the case, the decision is conclusive till it is set aside in an appropriate proceeding. But where there has been no such adjudication, the decree remains a decree without jurisdiction and cannot operate as *res judicata*.

The result is that this appeal is allowed and the preliminary decree in suit No. 1083 of 1912 passed on the 2nd September, 1914, the decree absolute made on the 24th August, 1917 and all subsequent orders made on the basis thereof must be set aside. The consequence will be that suit No. 1083 of 1912 will stand revived at the stage when leave under clause 12 was granted. The Khettrys as plaintiffs in that suit will be at liberty to amend their plaint if they so desire and in such manner as they may be advised; if the suit is limited as a suit to enforce the mortgage of the 13th December, 1907, against Banerjee, it will be tried on the merits. The appellant is entitled to his costs both here and in the Court below including the costs of the order made on the 7th August, 1918.

Fletcher, J.—I agree.

H. C. Ghose, Attorney for the Appellant.

J. K. Dutt: Attorney for the Respondents.

A. T. M. *Appeal allowed.*

Before Sir Asutosh Mookerjee, Knight, Judge, and Sir Ernest Edward Fletcher, Knight, Judge.

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v.

LUKHMI CHAND JHAWAR AND ANOTHER.*

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Suit, maintainability of—Suit to impeach award made under Indian Arbitration Act—Indian Arbitration Act (IX of 1899) Sec. 14—Ground of attack—Appeal—Judgment by consent of counsels—Consent given under intimidation, nature of—Law, interpretation of.

When an award under the Indian Arbitration Act, has been made and filed, a party affected thereby can maintain a suit to impeach it on grounds not included within the scope of section 14 of the Indian Arbitration Act.

Where a ground of attack goes to the root of the matter and arises as it were before the constitution of the domestic forum, a suit is maintainable for the investigation and determination of the controversy according to the procedure prescribed by law.

Where the grounds of attack are completely covered by section 14 of the Indian Arbitration Act, an application is the exclusive and not merely an alternative remedy, the adjudication by a Court other than a Chartered High Court, will be final and not liable to be challenged by way of appeal: *Ripley* v. *Nakapiet* (1) referred to.

A judgment obtained by consent of counsels acting in Court, in a matter within their authority, cannot form the subject of appeal: *Bradish* v *Gee* (2) followed.

When consent of the Counsels was accorded only when the Judge intimated that he would otherwise decline to entertain the motion, it is not free and fair but constrained and involuntary acquiescence in a mode of trial which the Court has decided to adopt.

A Judge should not interpret statutory law, when it provides for a specific procedure, by reference to decisions pronounced under a different system of procedure.

The plaintiff buyer sought to set aside the award of the arbitrators appointed under the Indian Arbitration Act, on the ground that there was no valid contract between the parties and also imputed fraud to the defendants inasmuch as they claimed damages for refusal to accept goods which they had never offered and were indeed not in a position to deliver. The case for the defendants sellers was that there was a valid contract for the sale of goods, that they delivered the goods according to the contract, and that the plaintiff buyer wrongfully refused to accept the goods and then cancelled the contract. They thereupon gave notice of their intention to re-sell and actually re-sold the goods three days later. They next applied to the Chamber of Commerce for arbitration and notice was served upon the buyer. The buyer repudiated the authority of the Arbitration Tribunal to

* Appeal from Original Civil No. 95 of 1919, against the decree of Mr. Justice Rankin, dated the 19th August, 1919.

(1) (1912) 6 L. B. R. 88; 5 Bur. L. T. 155.

(2) (1754) 1 Kenyon 73 (76); 1 Ambler 229.

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deal with the matter, but, under protest, submitted to them his own version of the affair. The buyer also applied to the tribunal for leave to appear by counsel and to tender oral evidence in support of his case. This request, however, was refused, and an award was made against him. The award was forthwith filed in Court and the buyer instituted the present suit:

Held, that the suit was maintainable.

Appeal by the Plaintiffs.

Suit to set aside an award.

The material facts appear from the judgment.

The suit was dismissed by the following judgment of

1919 *August, 19.*

Rankin, J.:—By a contract in writing No. 113, dated the 2nd August, 1918, the applicant agreed to buy from the respondents 16 bales of a certain kind of grey Dhoties at Rs. 5-6 per pair. These bales were to comprise two sorts distinguished by the numbers 736 and 7036. The printed contract is headed Forward Contract but in the writing at the foot of the form are the words "shipment May, June, 1918." The contract contains a submission to arbitration which reads, so far as I am concerned with it, as follows:—"Any dispute or claim under this contract is to be settled by the Bengal Chamber of Commerce."

The goods tendered by the sellers in fulfilment of contract were rejected by the buyer on the ground that each bale did not contain Dhoties having borders of seven particular colours. There is no dispute about this fact but the sellers say that there is no such stipulation as to particular colours in the contract of sale.

Upon this dispute an arbitration was held under the rules of the Chamber of Commerce and on 5th June, 1919, an award was made against the buyers for Rs. 16,076-11-0 with certain interest and costs.

The buyer now seeks the validity of the award.

The facts upon which the buyer founds are these. He says that these particular goods are a new and not an established line of merchandise in Calcutta and that at the time of the contract they had already arrived. That the contract was made by a broker Idan Chandak employed by the sellers to dispose of these goods and furnished by them with a shipment sample which is an exhibit in these proceedings. That sample contained a specimen of No. 736 and No. 7036 each with a coloured border. It also contains seven small cuttings each with a coloured border which cuttings can only be intended to show the colours of the borders. Included among the seven are the same borders as are on the two specimens above

mentioned. In the margin opposite to each cutting and under the heading "assortment" are figures which denote the number of pairs having each border. The figures for the seven are 56, 28, 28, 28, 28, 28, 29 which total 225 and there is a note which states that in each bale there are to be 225 pairs of No. 736 and 225 of No. 7036. On the back of the cover is a label which contains the figures 126-136.

The buyer's case is that he bought on or with reference to this shipment sample and intended to obtain the assortment of borders therein so carefully shown. He files an affidavit of the broker stating that the sample was given to him to explain to intending buyers the assortment of borders as well as the kind of material and that at the time of the sale he told this buyer that the goods would contain the seven different borders illustrated in the sample.

The seller's case on the merits is that the shipment sample refers in its entirety to the eleven particular bales whose numbers 126-136 are on the back; that the contract was for 16 bales not 11; that the sale was not of individual bales by separate samples appropriate to that special lot; that this sample was provided to show the material, and that nobody in the piece goods business could believe for a moment that the buyer did not understand perfectly well that he was not contracting for these particular bales and could not expect to get exactly that assortment of borders. The sellers point to the contract which is in writing and they say that it is not a sale by sample at all.

How much substance there is in the discrepancy between the borders on the goods tendered and the borders illustrated in the sample, I do not know. The buyer's chief grievance seems to be that a red border illustrated in the sample is not present, at all events in due proportion. In law the discrepancy is sufficient in any case if the buyer be otherwise in the right.

This being the general nature of the dispute the sellers called an arbitration in March. 1919. It is important to see what was the defence taken by the buyer in his case, dated 23rd May, 1919, before the arbitrators. The document which is exhibited to his affidavit is divided into two parts: objections to the jurisdiction and defence on the merits. The objections to jurisdiction are five in number and all five are pointless and bad. The only observations which need be made about them are two first, that they nowhere contain or even adumbrate a suggestion that there was no contract between the parties; secondly, that they do contain an allegation that the resale on the basis of which the seller's claim for damages is computed was fraudulent. This latter charge is made without any

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particulars but I now understand it to mean that the sellers did not have the goods and that the resale was only a pretence. The defence as to merits is that already explained; it contains a statement of an express verbal promise by the broker that the borders in each bale would be those shown by the sample, or of an admission verbally made to this effect by the broker in the presence of both parties.

On the 28th May, the buyer's solicitor by letter to the Tribunal says this:—"My client is desirous of being represented by Counsel before the Tribunal when it is sitting to decide on the said questions which are highly technical and I have no doubt that your Court will avail itself of legal assistance. If you inform me of the date fixed by the Tribunal for hearing, I will appear with Counsel and client and his evidence." The reply of the same date is this:—"With reference to your letter of the 28th May, I am directed by the Court which has been constituted to adjudicate on this dispute to say that they do not require the attendance of either of the parties with or without Counsel or legal adviser. The arbitration will be held at 3 p.m. tomorrow, Thursday, the 29th May."

On the 5th June the arbitrators found against the buyer who now seeks to set aside the award, on grounds which in my mind reduce themselves to two.

The first line of attack is one discovered since the arbitration and produced for the benefit of this Court. It is based not indeed upon an allegation that the parties were not *ad idem* but upon an allegation that the contract was as the buyer says, and that the broker made the express verbal representation as to the borders; but that if this be wrong, contrary to the buyer's view, then the parties were not *ad idem*; then there was no submission and then the award falls with the contract.

Now if the buyer desired to impeach the contract on the grounds of fraud, misrepresentation or mistake, he could have brought his suit and had the arbitration restrained on the rule in *Kitts* v. *Moore* (1). If he did not desire to adopt this course he could prior to the arbitration have claimed that the contract was voidable on those grounds and have elected to avoid it. This would have been a dispute which went to the existence or validity of the submission itself and on such a dispute the arbitrators could not at all events finally adjudicate so as to bind him at all. Now so far as I know at no time prior to the award did the buyer ever even elect to avoid the contract on these grounds or any others. He has gone before the arbitrators taking all sorts of

(1) (1895) 1 Q. B. 253.

objections but these are on the footing that there was a contract and on the footing that the submission therein contained was valid. Their jurisdiction depended upon what the dispute was and it cannot be ousted now by the buyer seeking to dispute something else.

Having no dispute before them as to the existence of the contract or as to the validity as distinct from the scope of the submission, the arbitrators rightly rejected the invalid and unsubstantial pleas to their jurisdiction. If they have properly dealt with the merits, the award cannot in my judgment be impeached at all. Still less will such a case be entertained as a *pis aller* when the facts to which the buyer swears are that both parties were agreed about what they meant, that the sellers are falsely alleging that both parties meant something different but perhaps both parties may be wrong. Such a case in my judgment calls for and admits of no investigation whatsoever save a comparison of the buyer's case before the arbitrators with the contentions which he raises now. His statements may be true or false about the merits; they matter nothing for this purpose.

The second line of attack is that the award should be set aside under section 14 of the Indian Arbitration Act. On this there are two matters for consideration. First, the allegation that the resale on the 25th February 1915 was fraudulent or only colorable on the sellers' part and that the award has therefore been improperly procured. Secondly, the fact that the arbitrators did not allow oral evidence and did not permit the buyer to attend by attorney and counsel.

The alleged fraudulent resale is mentioned in the buyer's case before the arbitrators as an objection to their jurisdiction. What the buyer states as to the facts in his affidavit on this motion is wild hearsay from unnamed sources and is not evidence at all. The one element of fact is that the goods were with the Hongkong and Shanghai Bank and this circumstance which is not in the least degree suspicious is fully explained by the sellers. It is manifest that the buyer has not now and never has had a tittle of evidence to support his charge. On the measure of damages it does not matter whether the sellers resold the dhoties, wore them, or lost them; unless the alleged figure of resale was below what the goods should have fetched at the date of the breach, the arbitrators who are experts on such questions would be quite entitled to award the full amount of the seller's claims. This allegation of fraud was introduced, as the buyer's case shows, for another object altogether

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namely, under an erroneous notion that the mere allegation of fraud would oust the arbitrator's jurisdiction and defeat the arbitration clause. If I am now asked to retry the issue on the question whether the award has been improperly procured I hold that there is no evidence worthy of attention to sustain the charge.

This second use of the allegation failing, learned counsel for the buyers explained to me a third. He said that he was not so much relying upon having proved in this way that the award was procured by fraud as contending that this part of the buyer's case made it particularly easy to regard as misconduct the arbitrator's refusal to hear oral evidence. Whether this is a more reasonable proposition, I shall consider later.

I pass to the complaint which arises out of the letters of the 28th May exchanged between buyer's solicitors and the Tribunal.

In the first place the buyer's complaint that he was not allowed to appear by counsel or attorney may be dismissed. The matter is clearly covered by R. XIV of the Chamber of Commerce Rules which are really part of the arbitration clause in the contract. Assuming that this rule does not deprive the buyer of the right to the proper exercise of a discretion by the arbitrators, and that this may be called in question under section 14 of the Arbitration Act, I should require very plain and solid reasons before finding misconduct upon such a matter. These arbitrations exist largely to obviate protracted and expensive litigation and if this be one of the sacred rights of man, this buyer has contracted out of it.

The refusal after demand made to hear oral evidence at all, is a more difficult and important matter and the buyer's written case must be looked at carefully and as a whole.

The arbitrator's first duty was to examine this. It is not, and is not required to be, a formal pleading and in it the buyer could and did indicate both the facts relied upon and the nature of his evidence. It cannot be that arbitrators are guilty of misconduct in not entertaining any case which is not fairly and clearly raised. I have therefore to put aside altogether any question of there having been no contract, or of the contract having been voidable and having been avoided by election of the buyer. This being so, the fundamental thing for the arbitrators was the fact that this contract was in writing. Apart altogether from the 13th clause the ordinary rule that it could not be varied or added to by oral evidence was the most plain stepping stone to a decision. The writing says nothing about a sample. It is a sale by description. "Upon a sale of goods described in a written contract evidence that a sample was exhibited

at the time of the sale is not admissible for the purpose of showing either that the seller was entitled to deliver goods according to the sample but not answering to the description or that the buyer was entitled to refuse goods answering to the description because not corresponding to the sample." Leake on Contracts, 6th edition p. 12c, Evidence Act, section 92: *Tye* v. *Fynmore* (1); *Myer* v. *Everth* (2); *Syers* v. *Jonas* (3), and *Hasnor* v. *Groves* (4).

Now on the buyer's case this simple consideration was in my judgment sufficient to decide the only issue raised. If the statements of the broker are to be treated as a verbal warranty they could only be put in evidence on the footing that they did not add to or vary the contract but were a purely collateral matter. The arbitrator's duty in face of the buyer's case was simply to hold first, that it was not a collateral matter and secondly that if it was it had nothing to do with them. Their duty was to decide disputes under the contract and only these. If again the statements of the broker are tendered under the contract as evidence to enable the arbitrators to apply the contract to its proper subject matter "grey Jacconet dhooties No. 736 (16 × 14) and 7036 (17 × 15) 39 × 2/9 yds. 7/16 col," the arbitrators were quite right to ignore such evidence. No one even now contends that the numbers 736 or 7036 import a particular assortment of borders or that such an assortment is conveyed by the words "7/16 col." or that the 16 bales contracted for were the specific bales 126-136 which are eleven only.

No doubt it is still possible for the buyer if allowed to invent a new case to suggest a custom in the piece goods trade by which all sales are sales by sample even when reduced into writing so as not to express this term. Such a case was not raised before the arbitrators and if it had been I think that it is just the sort of point which these arbitrators could validly decide by their own knowledge.

The truth is that the buyer's case was put forward as a case of sale by sample and the arbitrators were bound in law to rule against him on this point.

The whole of the six paragraphs which form the buyer's case upon the merits—they form the buyer's whole case apart from his futile pleas to jurisdiction—are governed and introduced by words which show this plainly (without waiving..... reasons given below). There is not anywhere in the whole case—not in the 5th plea to jurisdiction, for example—a trace of a suggestion

(1) (1813) 3 Camp. 462.
(2) (1814) 4 Camp. 22.
(3) (1848) 2 Exch. 111.
(4) (1855) 24 L. J. C. P. 56.

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that sellers were not able and ready to deliver, apart from the question about assortment of borders.

The evidence proffered is described in paragraph 3 "as evidence of himself and the said Babu Idan to prove that the sale was by the said sample and that it was specifically agreed that goods of 7 different borders in a bale according to the said sample would be supplied."

So far as regards the alleged fraud as to the resale it is clear from the buyer's case that he was not proposing to prove the fraud before the arbitrators at all. He says that it can only be proved before the High Court. He says that he "has recently come to know" giving no indication of the source. The charge of fraud is itself so bald and empty that any tribunal would be well entitled to ignore it: *Wallingford* v. *Mutual Society* (1).

It is put forward as an allegation which merely as an allegation ought to oust the arbitrators from the case and beyond the function it has and professes to have no other point, sense or purpose.

In these circumstances I have to enquire whether the arbitrators have exceeded their rights under rule XIII of the Chamber of Commerce Rules. I think they have not The intention is first that the parties' contentions shall be put in writing; that thereupon the arbitrators shall have jurisdiction to decide whether a formal hearing is necessary. If oral evidence beyond the mere proof of documents of which the factum is not disputed is on the face of the written cases relevant and admissible, I think that upon these rules a refusal to hear such evidence would be very difficult to support, except perhaps upon such questions as market values as to which the arbitrators may themselves be entitled to act on their own expert knowledge or (under rule XVII) that of others. I think however this case fails to satisfy the condition which I have stated. The letter of 28th May to the Tribunal must be read with reference to the buyer's case and is an offer of irrelevant and inadmissible evidence only, coupled with argument of counsel. The reply is in terms of rule XIV and the arbitrator's conduct is in my judgment within rule XIII as to procedure. I think they were entitled to proceed without a formal hearing and that an award in favour of the sellers was the only possible decision. If the allegation of fraud as to the resale had been seriously stated and not *mere palpatio* and if it had been mooted upon the question of the amount of damage I should at least have remitted the award to the arbitrators to make sure that they had not assessed the damages on the strength of the

(1) (1880) 5 A. C. 685 (697).

alleged resale, as distinct from merely limiting the figure by the amount admitted to have been received upon resale. It would be utterly wrong however to do so in the absence of these conditions and I see no reason to think that this assessment of damage was not right.

If it was desired to have it set aside either as a nullity by reason of its not being within the scope of a valid submission or under section 14 of the Indian Arbitration Act, the proper course under the rules was to apply by petition to have it taken off the file or to have it set aside. Instead the buyer commenced a suit on 16th June and brought on a motion for an interlocutory injunction. I will not here repeat what in previous cases I have said about this particular abuse. It is defended sometimes when the submission is attacked, on the ground that the application is not within section 14 or any other section of the Act. This is no valid reason. The award here was filed under the Act before action brought, and became enforceable in execution under the Act as though it were a decree. If it is to be taken off the file as a nullity, the application should be made under the Act which has been abused. In England awards, save by leave obtained on summons, are not enforceable except by an action. It is not usual or necessary therefore to apply to set aside an award on the ground of want of jurisdiction in the arbitrators. The old English cases however show that this was done where a step could be taken to enforce the award and the interference of the Court was necessary: Russel, 9th Edn. p. 369: *Turnbull* v. *Brown* (1); *Worral* v. *Deane* (2). This under the Indian Arbitration Act is always the position and all applications to set aside an award which has been filed should be made by petition, whatever be the ground.

At the hearing of the motion I declined to entertain it except on the basis that it be treated both as the trial of the action and as a petition under the Indian Arbitration Act. To this counsel on both sides consented. I pointed out that if any oral evidence became necessary in these cases it is open to the Court on petition and either by first directing an issue or otherwise to take such oral evidence. Also that it is not by any means intended that such matters should be disposed of without full consideration. What is intended is that they should be disposed of finally with promptness; without unnecessary vexation, delay or expense; and in a proceeding in which the power to remit an award can if necessary be properly exercised.

(1) (1826) 5 B. and C. 384. (2) (1833) 2 Dowl. 261.

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I see no reason in this case to exercise the power of taking oral evidence and I dismiss the motion and the action with costs.

Against this decision, the plaintiff appealed.

Messrs. B. Chakravarty and *A. K. Ghose* for the Appellant.

Messrs. S. M. Bose and *Langford James* for the Respondent.

The judgments of the Court were as follows:

Mookerjee, J.—This is an appeal by the plaintiff in a suit for declaration that a contract for sale of piece goods, alleged to have been made between him and the defendants on the 2nd August, 1918, was invalid, and that an award made by the arbitration tribunal of the Bengal Chamber of Commerce in their favour on the 5th June, 1919 for damages for breach of the said contract was equally void and inoperative. The plaintiff also prayed for a perpetual injunction to restrain the defendants from enforcing the award. The suit was instituted on the 16th June, 1919. On the 20th June, the plaintiff applied for an interlocutory injunction during the pendency of the suit and an *ad interim* injunction during the pendency of the Rule on the application. A Rule was issued and an *ad interim* injunction was granted on terms as to security. The Rule for interlocutory injunction was heard on the 25th July, 1919. Mr. Justice Rankin, as appears from his judgment, declined to entertain the hearing of the motion "except on the basis that it be treated both as the trial of the action and as a petition under the Indian Arbitration Act." He further thought that counsel on both sides consented to this, and thereafter heard the matter on the affidavits, as he saw no reason to exercise the power of taking oral evidence. On the 19th August, judgment which had been reserved was delivered, whereby the motion and the action were dismissed with costs. The plaintiff has now appealed against this judgment. We have not been invited to consider the propriety of the order in so far as it dismissed the application for interlocutory injunction during the pendency of the suit. The plaintiff has, it was stated, brought into Court the money due on the award and no longer desired an *ad interim* order. The substantial question argued in the appeal is, whether the suit has been properly tried without oral evidence, as if the plaint were a petition under the Indian Arbitration Act.

We have at the outset to consider whether the procedure adopted in the Court below was followed with the consent of counsel on both sides, for, as Lord Hardwicke held in *Bradish* v. *Gee* (1), it is well-settled that a judgment obtained by consent of counsels acting

(1) (1754) 1 Kenyon 73 (76).

in Court, in a matter within their authority, cannot form the subject of an appeal. To determine this question, we shall refer to the Minute Book where we find the following entry :

"Friday, the 25th July, 1919.

Before the Hon'ble Mr. Justice Rankin.

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Mr. James for the Defendant.

Mr. A. K. Ghose for plaintiff appears with *Mr. Chukerbutty*.

Mr. James—I consent that this motion should be treated as petition under the Arbitration Act.

Mr. Ghose—I have no objection, but to prove fraud Your Lordship will have to hear oral evidence.

Mr. James—Let Mr. Chukerbutty open the motion.

Mr. Chukerbutty opens.

Mr. James reads his affidavits.

Mr. Chukerbutty replies.

Midday Adjournment.

Mr. Chukerbutty addresses the Court and refers to cases 23 C W. N. 811, 22 C. W. N. 535, 13 C. W. N. 63.

Mr. James addresses the Court on the Rules of Bengal Chamber of Commerce.

The Court—I reserve judgment."

The only matter for consideration before the Court on the 25th July, 1919 was, as already stated, the application by the plaintiff for an interlocutory injunction. Mr. Langford James, who appeared on behalf of the defendants, gave his consent that the motion should be treated as petition under the Arbitration Act. Mr. Ghose, who appeared for the plaintiff, did not give his unqualified consent, for while he stated that he had no objection, he expressly added that to prove fraud the Court would have to hear oral evidence. The case was then opened, the affidavits were read and reference was made to the decisions in *Hurdwary* v. *Ahmad Musaji* (1); *Gajanand* v. *Shaik Talib* (2) and *Sardar Mull* v. *Agarchand* (3). After the addresses of the counsels, judgment was reserved. Judgment was delivered, twenty-five days later, on the 19th August. The entries in the Minute Book do not support the statement in the judgment that counsel on both sides had consented that the hearing of the motion should be treated both as the trial of the action and as a petition under the Indian Arbitration Act. We

(1) (1908) 13 C. W. N. 63. (2) (1917) 22 C. W. N. 535.
(3) (1919) 23 C. W. N. 811.

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cannot, in these circumstances, hold that the procedure followed was adopted by consent of counsel on both sides.

But it is material to add that even if the Minute Book had shown the factum of consent, it could not be treated as consent freely given by counsel in the exercise of his discretion as an advocate invested with a general control over the conduct of the case of his client. The learned Judge states in his judgment that the consent (which he thought was given) was accorded only when he intimated that he would otherwise decline to entertain the motion. If counsel had consented, after the expression of such determination by the Court, the consent could not be deemed free and fair, and might well be regarded as constrained and involuntary acquiescence in a mode of trial which the Court had decided to adopt. The respondents have argued that, even in such circumstances, the counsel should not yield, but let the Judge dismiss the case and then appeal with a view to obtain a reversal of his order. It may be conceded that this is a possible course for counsel to adopt. But it is important to observe that whichever course were followed, the ultimate result would make no difference to the respondents. Assuming that counsel had as a matter of fact, consented, if we were to set aside the order on the ground that there had been no free consent, the suit would stand restored. If, on the other hand, the suit were dismissed because counsel did not agree to adopt the course indicated by the Court, the reversal of the order of dismissal by the Court of appeal would also result in the revival of the suit. But, we need not elaborate this aspect of the matter further, because, as the Minute Book shows that counsel on behalf of the plaintiff did not consent to the course adopted by the learned Judge, his decree must be set aside, provided it is established that the plaintiff was entitled to have the action tried, not merely upon affidavits but also upon oral evidence. This question must consequently be now investigated.

The plaintiff buyer seeks to set aside the award of the arbitrators on the ground that there was no valid contract between the parties and also imputes fraud to the defendants inasmuch as they have claimed damages for refusal to accept goods which they never offered and were indeed not in a position to deliver. The case for the defendants sellers is that there was a valid contract made on the 2nd August, 1918, for the sale of 16 bales of grey dhotis, that they delivered the goods according to the contract on the 24th September, that the plaintiff buyer wrongfully refused to accept the goods and then cancelled the contract on the 17th October. They there-

upon gave notice on the 22nd February of their intention to resale and actually resold the goods three days later. They next applied to the Chamber of Commerce on the 7th March for arbitration and notice was served upon the buyer on the 11th March. The buyer, on the 13rd May, repudiated the authority of the Arbitration Tribunal to deal with the matter, but, under protest, submitted to them his own version of the affair. The buyer also applied to the tribunal for leave to appear by counsel and to tender oral evidence in support of his case. This request, however, was refused, and an award was made against him on the 5th June. The award was forthwith filed in Court and the buyer instituted the present suit on the 16th June. As regards the alleged contract, the buyer and the sellers are disagreed upon a fundamental point. The case for the buyer is that the sale was with reference to the shipment sample and was intended to include the assortment of borders therein carefully shown. The case for the sellers is that the sample was provided only to show the material, and the buyer could not expect to get exactly that assortment of borders. In these circumstances, the plaintiff urges that the parties were not *ad idem*, and there was no valid contract between them in fact and in law. The plaintiff further urges that the defendants were not ready to deliver goods according to sample and that the claim for assessment of damages on the basis of a pretended resale was fraudulent It cannot be seriously maintained for a moment that a suit is not maintainable for the determination of this controversy between the parties. Section 9 of the Code of Civil Procedure provides that the Courts shall have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred. This is unquestionably a suit of a civil nature, and we have not been able to discover how its cognizance is barred expressly or impliedly. There is no provision in the Indian Arbitration Act which bars this suit. Section 14 empowers the Court to set aside an award where an arbitrator or umpire has misconducted himself or an arbitration award has been improperly procured. Assume for a moment that this authority of the Court may be invoked by way of an application; still the question may arise, whether such remedy is exclusive, or, whether the party affected may not, at his choice, have recourse to a suit as the more preferable course. We need not decide that question, because, in the case before us, the grievance alleged is deeper and broader than what is contemplated by section 14. But it may be observed parenthetically that if the view is taken that where the grounds of attack are completely covered by section 14, an applica-

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tion is the exclusive and not merely an alternative remedy, the adjudication by a Court other than a Chartered High Court, will be final and not liable to be challenged by way of appeal, as the Indian Arbitration Act contains no provision for an appeal: *Ripley* v. *Nakapiet* (1). But we need not examine that aspect of the matter further, for here the buyer disputes the very existence of the contract and adds that the claim of the sellers to recover damages is tainted by fraud. This is plainly a matter for investigation in a suit. The learned Judge has taken the contrary view for reasons set out in the following passage of his judgment:

"This award is filed in Court on the 13th June, 1919. If it was desired to have it set aside either as a nullity by reason of its not being within the scope of a valid submission or under section 14 of the Indian Arbitration Act, the proper course under the rules was to apply by petition to have it taken off the file or to have it set aside. Instead, the buyer commenced a suit on 16th June and brought on a motion for an interlocutory injunction. I will not here repeat what in previous cases I have said about this particular abuse. It is defended sometimes when the submission is attacked, on the ground that the application is not within section 14 or any other section of the Act. This is no valid reason. The award here was filed under the Act before action brought, and became enforceable in execution under the Act as though it were a decree. If it is to be taken off the file as a nullity, the application should be made under the Act which has been abused. In England, awards, save by leave obtained on summons, are not enforceable except by an action. It is not usual or necessary, therefore, to apply to set aside an award on the ground of want of jurisdiction in the arbitrators. The old English cases, however, show that this was done where a step could be taken to enforce the award and the interference of the Court was necessary; Russel 9th Ed. p. 369. *Turnbull* v. *Brown* (2); *Worrral* v. *Deans* (3). This, under the Indian Arbitration Act, is always the position and all applications to set aside an award which has been filed should be made by petition, whatever be the ground."

We are not prepared to adopt this as a correct exposition of the law and to hold that an award which has been filed can be set aside only by application, whatever the ground on which it is impeached. Indeed, the learned counsel for the respondents has made no attempt to support the proposition. There is no trace in the Indian Arbitration Act of any provision indicating that the Legislature intended

(1) (1912) 6 L. B. R. 88; 5 Bur. L. T. 155.
(2) (1826) 5 B. & C. 384; 29 R. R. 275.
(3) (1833) 2 Dowl. 261.

to prescribe such a restrictive rule and to take away the right of suit. The learned Judge refers to his observations in previous cases; our attention has been drawn to only one such, namely, *Sardar Mull* v. v. *Agarchand* (1). There, the question primarily under consideration related to the grant of interlocutory injunctions to restrain arbitration proceedings commenced on the basis of a contract which was either denied or impeached on equitable grounds. The earlier decisions reviewed in that judgment do not justify the inference that when an award has been made and filed and has consequently become enforceable as a decree of Court, a party affected thereby cannot maintain a suit to impeach it on grounds not included within the scope of section 14 of the Indian Arbitration Act, for example, such grounds as that the contract was never made or is not enforceable by reason of fraud, mistake or surprise. Nor do the cases of *Turnbull* v. *Brown* (2), and *Worrall* v. *Dennes* (3), lead to that conclusion. Besides, we should not interpret our statutory law, when it provides for a specific procedure, by reference to decisions pronounced under a different system of procedure. We need not decide whether a suit does or does not lie to set aside an award on grounds covered by section 14, which contemplates two classes of cases namely, *first* where there has been legal misconduct on the part of the arbitrator or umpire, and, *secondly*, where there has been impropriety on the part of the litigant in the procuring of the award, both relating plainly to events between the commencement and termination of the arbitration proceedings. But where the ground of attack goes to the root of the matter and arises as it were before the constitution of the domestic forum, a suit is maintainable for the investigation and determination of the controversy according to the procedure prescribed by law. The case before us clearly falls within this category.

The result is that this appeal is allowed and the suit remanded for trial. The appellant will have the costs in this Court; all the costs in the Court below mentioned in the decree and order of the 19th August, 1919, will be costs in the suit.

Fletcher, J.—I agree.

Mr. E. P. Swinhoe: Attorney for the Appellant.

Babu M. N. Sen: Attorney for the Respondents.

A. T. M. *Appeal allowed.*

(1) (1919) 23 C. W. N. 811. (2) (1826) 5 B & C. 384; 29 R. R. 273.
(3) (1833) 2 Dowling 261.

PRIVY COUNCIL.

PRESENT: *Viscount Haldane, Lord Buckmaster, and Lord Dunedin.*

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July, 1.

RANI HEMANTA KUMARI DEBI

v.

THE MIDNAPUR ZEMINDARI COMPANY, LIMITED.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Document—"Agreement for a lease,"—Registration Act (XVI of 1908), Secs. 17 (1) and (2), 49—Admissibility of document incorporated in decree which would be otherwise inadmissible unless registered—Compromise of suit, proper procedure in—Code of Civil Procedure (Act XIV of 1882), section 375.

An "agreement for a lease," which "a lease" is defined by the Registration Act, to include, is a document which effects an actual demise and operates as a lease. Such a document must be registered as required by the Registration Act. An agreement to grant a lease upon the happening of a contingent event at some future *indeterminate* date is not such an "agreement for a lease" within the meaning of the Registration Act, because an "agreement for a lease" within the Act creates a *present* and *immediate* interest in the land.

When a suit is compromised, the whole terms of the compromise should be incorporated in the decree, or in a schedule to the decree, and then a decree passed with regard to the subject-matter of the suit. The decree taken as a whole would include the agreement which would then be admissible in evidence, even though it is a document which would otherwise require registration and would be inadmissible in evidence if not registered.

Prenal Annee v. *Lakshmi Annee* (1) followed.

Panchanan Bose v. *Chandi Charan Misra* (2) approved.

Appeal from a judgment and decree of the High Court of Calcutta (Mookerjee and Beachcroft, JJ.) dated the 6th July, 1914, which affirmed a judgment and decree of the Subordinate Judge of Nadia, dated the 29th March, 1910.

The material facts are sufficiently stated in their Lordships' judgment.

The judgment of the High Court was reported in 22 C. L. J. 44.

Dunne, K. C. (and *Dube*) for the Appellant. The compromise was an agreement to grant a lease. The petition is an agreement for a lease, and ought to have been registered. It was not registered and therefore it is inadmissible in evidence: Section 49 of the Registration Act. The decree can only be operative as to

(1) (1899) L. R. 26 I. A. 101; I. L. R. 22 Mad. 508.
(2) (1910) I. L. R. 37 Calc. 898.

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lands comprised in the decree, not to lands outside jurisdiction. Messrs. Watson were assisting the Government in breach of the agreement. Under section 17 of the Registration Act "lease" includes an "agreement to lease." In India the document would be regarded as a lease, and would require registration. In India it would be a lease on the doctrine of *Walsh* v. *Lonsdale* (1). It is a document affecting the property, and therefore it is a transaction affecting property: *Sarat Chandra* v. *Shyam Chand* (2); *Fajalak Ali Miah* v. *Kamaruddin Bhuya* (3); *Hurjivan* v. *Jamesetji* (4); *Purmanandas* v. *Dharsey* (5); *Syed Sufdar Reza* v. *Amzad Ali* (6), referred to.

Raikes (and *De Gruyther, K. C.*) for the Respondents: As the compromise which contains the agreement was incorporated in the decree it does not require registration: *Raghubans Mani Singh* v. *Makabir Singh* (7). The agreement for a lease within the meaning of the Registration Act must create an immediate interest in the property. In any event the contract was established by oral evidence. *Pranal Annee* v. *Lakshmi Annee* (8) referred to.

No reply was called for.

The judgment of their Lordships was delivered by

July 1.

Lord Buckmaster: The real question on this appeal is whether an agreement made in writing between Robert Watson & Company, Limited, and the appellant, incorporated in a degree of the Subordinate Judge of Nadia but not registered, is admissible in evidence. The appellant contends that it is not, and the respondents assert that it is.

The determination of the question depends mainly upon the construction of the Registration Act of 1908, but before considering the terms of this statute it is desirable to state shortly the facts which have led up to the dispute. In 1895 the appellant instituted two suits in the Court of the Subordinate Judge of Nadia, the one against the Government (No. 72 of 1895) and the other against Robert Watson & Company, Limited, being No. 73 of 1895. The object of each of these suits was to obtain possession of land claimed by the appellant. The land had been diluviated owing to encroachments of the river Padma and had then subsequently reappear-

(1) (1882) 21 Ch. D. 9.
(2) (1912) I. L. R. 39 Calc. 663.
(3) (1886) I. L. R. 13 Calc. 170.
(4) (1884) I. L. R. 9 Bom. 63.
(5) (1885) I. L. R. 10 Bom. 101.
(6) (1881) I. L. R. 7 Calc. 703 F. B.
(7) (1905) I. L. R. 28 All. 78.
(8) (1899) L. R. 26 I. A. 101; I. L. R. 22 Mad. 506.

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ed and formed the areas which were the subject of controversy. The suit No. 73 of 1895 was compromised, the terms of the compromise being that Robert Watson & Company, Limited, were to retain possession of the land they occupied, but that the ownership of the appellant was to be recognised and Watson & Company's possession was to be upon certain agreed terms as to payment of rent and otherwise. It was also provided that if in suit No. 72 the appellant succeeded in obtaining a decree against the Government, she should grant a *jote* settlement of the lands in such suit to Robert Watson & Company upon the same conditions as those agreed with regard to the land that was in their possession. This agreement was reduced into writing, a petition of compromise based upon it was filed by the appellant in suit No. 73, and on the 20th September, 1897, judgment was given in terms of the compromise and a decree was drawn up in pursuance of the judgment on the same date. This decree recites the claims in the suit and the petition for compromise and grants a decree in the terms of the compromise, which are then set out in full.

The appellant pursued her claim against the Government and the litigation proceeded through all the Courts until by His Majesty's Order in Council of the 4th April, 1906, the appellant was declared entitled to the land. Meanwhile, the rights of Messrs. Watson & Company had been sold to Messrs. Crawford & Gregson, and they, on the 3rd December, 1906, conveyed all their rights to the present respondents. The appellant refused, for various reasons which are not now material, to recognise the obligations into which she had entered by the compromise to grant a *jote* settlement of the lands the subject of suit No. 72, and the proceedings out of which this appeal has arisen, were instituted by the respondents claiming specific performance of the agreement in this respect.

Apart from matters which need not now be considered, the appellant's defence rested upon the ground that the compromise could not be given in evidence, firstly because, treated as an ordinary contract, it had not been registered, and secondly, if it were regarded as a decree, the decree was inoperative in relation to the lands in dispute, as they did not relate to the suit in which the decree sanctioning the compromise had been made.

With regard to the first, the Registration Act of 1908 provides that "lease" includes an agreement to lease, and by section 17 enacts that leases must be registered, the penalty for non-registration being imposed by section 49, which provides that, if not registered, no document shall affect immovable property which it com-

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prises or be received as evidence of any transaction affecting such property. If the document in question can be regarded as a lease within the meaning of this definition it could not be received in evidence. Their Lordships are of opinion that it cannot be so regarded. An "agreement for a lease," which a lease is by the statute declared to include, must, in their Lordships' opinion, be a document which effects an actual demise and operates as a lease. They think that Jenkins, C.J., in the case of *Panchanan Bose* v. *Chandi Charan Misra* (1), correctly stated the interpretation of section 17 in this respect. The present agreement is an agreement that, upon the happening of a contingent event at a date which was indeterminate and, having regard to the slow progress of Indian litigation, might be far distant, a lease would be granted. Until the happening of that event it was impossible to determine whether there would be any lease or not. Such an agreement does not, in their Lordships' opinion, satisfy the meaning of the phrase "agreement for a lease," which, in the context where it occurs and in the statute in which it is found, must in their opinion relate to some document that creates a present and immediate interest in the land. So far, therefore, as this decision depends upon the need for registration of the document as a lease, the Registration Act places no obstacle in the respondents' way. By section 17 (1) (b), however, it is also provided that other non-testamentary instruments which purport or operate to create, whether in present or in future, any right, title or interest, vested or contingent, of the value of Rs. 100 and upwards, to or in immovable property, need registration. But this is subject to the exception provided in sub-section (2) of section 17, which states that "Nothing in clauses (b) and (c) of sub-section (1) applies to," among other things, "any decree or order of a Court." If, therefore, the decree in the present case can be regarded as a decree within the meaning of that exception, there is nothing in the Registration Act to affect the matter. It is urged that it cannot be so regarded for this reason, that by section 375 of the Code of Civil Procedure (Act XIV of 1882) it is provided:—

"If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final, so far as relates to so much of the

(1) (1910) I. L. R. 37 Calc. 808.

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subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction."

The terms of this section need careful scrutiny. In the first place, it is plain, that the agreement or compromise, in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject matter of the suit as is dealt with by that agreement. Their Lordships are not aware of the exact system by which documents are recorded in the Courts in India, but a perfectly proper and effectual method of carrying out the terms of this section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement. This in fact is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents.

Turning now to the Registration Act of 1908, and considering the meaning of the word "decree" in section 17 (2) (vi), this must be read in connection with the purpose of the statute, which is to provide a method of public registration of documents, and there is, therefore, no reason why a limit should be imposed upon the meaning of the word so as to confine it to the operative portion only of the decree.

This conclusion is in agreement with the view expressed by Lord Watson in *Pranal Annee* v. *Lakshmi Annee and others* (1), on a point in close resemblance to that raised in the present appeal. In that case a suit was originally raised for possession of certain land, and certain other lands were expressly excluded from the ambit of the claim. That suit was compromised by two documents, the one being styled a *razinamah*, or agreement of compromise, and the other an agreement of union. The agreement of union, which related to the lands outside the suit as well as those within, was not registered and was not submitted to the Subordinate Judge before whom the litigation depended. The *razinamah* was produced in the suit on a petition asking :—" That a decree may be passed in accordance with the *razinamah* which they have presented under section 375 of the Civil Procedure Act, after settling." It contained, in the first place, a detailed description of the lands which were in

(1) (1899) L. R. 26 I. A. 191 ; I. L. R. 22 Mad. 508.

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controversy in the suit of 1885, and stated that the parties had agreed to share these lands in certain proportions. It also independently set out the effect of the agreement as to the lands outside the suit, and described them in a schedule named schedule D, but the order made did not include and had no reference to these lands. The parties acted upon the entire agreement, and in a subsequent dispute as to the lands outside the suit of 1885 the question arose as to whether the *rasinamah* could be given in evidence. This Board decided that, so far as it was acted upon by the learned Judge, it was properly admissible, but that as the order made had not in fact referred to or narrated the terms of the compromise, the *rasinamah* being unregistered could not be received in evidence. But in expressing the judgment of the Board upon this point Lord Watson made the following statement :—

"If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half-share of the lands involved in that suit, and also a half-share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of land now in dispute. But their Lordships are unable to find that any such course was taken, either in the *rasinamah* or in the judicial order which gave effect to it. The *rasinamah* merely referred, by way of remark, to the lands now in dispute; and the Judge was only asked to give effect to a compromise which related to the lands then in dispute before him. This order, accordingly, merely concerns the latter, and has no reference whatever to the lands described in schedule D of the *rasinamah*. So far as regarded these lands, the compromise was not submitted to the learned Judge, but was deliberately left by the parties to stand upon their unregistered agreement of union." Section 375 and its effect were clearly under the consideration of the Board, and the judgment thus expressed showed that, merely regarding the question as a question of evidence and not as to the effect of the decree on lands outside the subject of the suit, such a document as that in the present case when incorporated in a decree was clearly admissible as judicial evidence. Though this judgment does not in terms refer to section 17 (2) (vi) of the Registration Act, it gives full effect to the opinion that their

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Lordships have formed as to its interpretation. The decree in the present case is a decree which makes no difference whatever in its language between one part and another part of the compromise; it incorporates the whole; and it is, in other words, a decree which, though affecting the lands in the suit as a decree, incorporates the whole of the agreement which led to the suit being compromised. For this reason their Lordships think that the registration of the agreement was unnecessary and that the decree is sufficient evidence of its terms.

The learned Subordinate Judge, before whom this matter was first heard, treated the decree as a nullity and based his judgment in favour of the respondents upon the view that, when once the agreement was held not to be a lease, there was nothing to compel its registration. He regarded the document as outside the provisions of sections 17 (1) (b). Their Lordships are unable to take this view. They think the document did purport to create a contingent right or interest in immovable property, and they do not think that in treating the decree *pro tanto* as a nullity the learned Subordinate Judge has given effect to the difference between receiving the decree in evidence as a decree and executing its terms as against property outside the suit. Mr. Justice Beachcroft in the High Court took the view on this point which their Lordships think accurate, and they are of opinion for the reasons they have given that the appellant's contention cannot succeed.

The appellant further raised a question relating to the circumstances under which the document was executed. She said the agreement was come to upon the basis that Watson & Company should not assist the Government in their defence of the appellant's suit and that they did in fact render active assistance, and thereby rendered it inequitable on their part to ask specific performance of an arrangement which was only come to on the terms that such assistance should not be afforded. Upon this point it is important to observe, in the first place, that if this really were a term of the arrangement, it is not to be found in the agreement; and secondly, that, if it affects the contract, it must affect it *in toto*, and that it is impossible for the appellant, having accepted and received the advantage of the compromise so far as it related to the lands in the suit, now to resist its effect upon the other portion of the lands to which it related.

For these reasons their Lordships think that the appeal should

be dismissed with costs, and they will humbly advise His Majesty accordingly.

Barrow, Rogers and *Nevill:* Solicitors for the Appellant.

Orr Dignam & Co.: Solicitors for the Respondents.

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Appeal dismissed.

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APPELLATE CRIMINAL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, and Mr. Justice Walmsley.

MIR MOUZE ALI

v.

KING-EMPEROR.*

CRIMINAL.
1920.
February, 17, 18.

Misdirection—Omission to warn jury not to pay heed to the result of previous proceedings—High Court, power of, to deal with accused person not appealing—Conviction of non-appealing accused set aside, while considering the cases of another accused.

An omission by a learned Judge to warn the jury to pay no attention to the result of the previous proceedings, amounts to misdirection.

Under section 439 of the Code of Criminal Procedure, the High Court has power, in a proper case, while trying the appeal preferred by another accused, to deal with the case of an accused person not appealing against his conviction and set aside his conviction: *Brojo Rakhal* v. *The Empress* (1) followed.

Appeal under section 419 of the Code of Criminal Procedure by one of the Accused.

The appellant was a Head Constable and was convicted at a trial by the jury of offences under sections 384, 448, 342 and 323 read with section 109 Indian Penal Code. He was tried along with another man who was a constable, called Belat Ali, who was found guilty of an offence under section 354 Indian Penal Code and was convicted of offence under sections 323 and 342 Indian Penal Code. This second accused did not appeal. The appellant was sentenced to a rigorous imprisonment for 6 months.

* Criminal Appeal No. 663 of 1919, against the order of M. C. Ghosh, Esq., Sessions Judge of Barisal, dated the 1st November, 1919.

(1) (1900) 5 C. W. N. 330.

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Babus Manmatha Nath Mukherjee, Jyotish Chandra Guha and *Radhika Ranjan Guha* for the Appellant.

Mr. Orr (*Deputy Legal Remembrancer*) for the Crown.

The judgments of the Court were as follows :

Sanderson, C.J.—In this case the appellant who was a Head Constable named Mir Mouze Ali has been convicted at a trial by the Jury of offences under section 384 (extortion), 448 (house trespass.), 342 (wrongful confinement) and 323 read with section 109 for abetment of the offence of voluntarily causing hurt. He was tried along with another man who was a constable, called Belat Ali, who was found guilty of an offence under section 354 which offence is that of assaulting or using criminal force to a woman with intent to outrage her modesty. He was also convicted of offence under sections 323 and 342 of the Indian Penal Code. The second accused has not appealed.

We have to deal at the present moment with the appeal of Mir Mouze Ali alone.

There were other charges against these two men in respect of which they were acquitted. The first accused was charged with abetment of rape under section 375 read with section 109 and the second accused was charged with rape under section 376. Of these charges the accused were acquitted. There was a further charge against the first accused under section 354 together with section 109, that is, the abetment of assaulting a woman with intent to outrage her modesty. He was acquitted of that charge. There was a charge against the second accused under section 384 together with section 109 that is, the abetment of extortion and the second accused was acquitted of that charge.

The learned vakil has argued that the direction of the learned Judge was wrong inasmuch as he referred to certain previous proceedings against these two accused and that such reference was inadmissible. The reference which the learned Judge made is as follows : After referring to the visit of Khorshed (the husband of the complainant) and his wife Baroo Bibi (the complainant), who appeared before Purna Chandra Mukerji, mukhtear, and told him their story, whereupon the mukhtear drafted a petition, Exhibit 2, and filed it in Court and the Sub-Divisional Magistrate examined the complainant Baroo Bibi on solemn affirmation on the same day :—the learned Judge said " The Sub-Divisional Magistrate in accordance with departmental rules, made a local investigation into the case and on the 9th of November, made a report to the District Magistrate

recommending the prosecution of the head constable and the constable under sections 342, 384, 448, 354 and 323, Indian Penal Code. The District Magistrate ordered their prosecution as recommended and sent the case for trial to the Additional District Magistrate. The Additional District Magistrate tried the case, and on the 23rd of December, 1918 he convicted both the accused and sentenced them to 6 months' imprisonment each under the above sections. Though the woman repeated to him her story of rape by the constable and two others he held that the story of rape was an exaggeration and a fiction. In appeal the Additional Sessions Judge affirmed the conviction and sentence on the 24th February, 1919. Thereafter the two accused men moved the Hon'ble High Court and the High Court on 10th June reversed the conviction and ordered that the case be committed to the Court of Sessions for trial. Accordingly on 18th July, the two accused men were committed to this Court for trial." My learned brother Mr. Justice Walmsley was a member of the Court which reversed the conviction and ordered a new trial, and as I understand the view which he and the other learned Judge took was that inasmuch as the story on behalf of the prosecution involved a charge of rape against one of the accused and abetment of rape against the other accused, the case ought to have been tried by a Court of Sessions, and ought not to have been tried by the Additional District Magistrate. Consequently they set aside the conviction and directed a new trial.

We have been informed by the learned vakil for the appellant that although there may have been during the course of the trial a reference made to the evidence which the individual witnesses gave on the previous occasion when the two accused were tried, there was no reference either by the prosecution or the defence to the result of those proceedings and, after reading the summing up of the learned Judge we think we must take it that that was so. The learned Judge, as I have shown by reading a part of his judgment, not only referred to the previous proceedings but referred to the result of those proceedings and also referred to the fact that the Additional District Magistrate convicted them of certain offences and that his decision was upheld by the Additional Sessions Judge. The learned vakil has pointed out that there was no warning given to the Jury that they must disregard altogether the result of the previous proceedings and that the responsibility was upon the Jury and that they must act upon the evidence which was given in the case and upon that evidence alone: He urged that the fact that the learned Judge has referred to those previous proceedings and to the result of the previ-

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ous proceedings and the omission to warn the Jury to pay no attention to the result of those previous proceedings may have affected the minds of the Jury materially in arriving at the conclusion at which they did. In my judgment that does amount to misdirection. In my judgment, if it was necessary for the learned Judge to refer to the previous proceedings, he certainly ought to have warned the Jury that they must not allow the result of those previous proceedings to affect their minds. It would have been much better if all reference to the previous proceedings could have been avoided. I am not in a position to say whether it was, but assuming for the sake of argument that it was necessary to refer to the previous proceedings then, I think that the learned Judge ought to have dealt with them in such a manner as to avoid if possible the minds of the Jury being affected by the result of the previous proceedings.

I need not consider the further points raised by the learned vakil, because, in my judgment the matter to which I have already referred amounted to misdirection.

Then we have to consider what course should be taken. The appellant has already stood his trial on two occasions and in my judgment it would not be right, having regard to the circumstances of this case, to direct that he should stand his trial a third time.

It remains for me to consider whether I should accede to the argument of the learned counsel for the Crown that the misdirection of the learned Judge was not sufficient to vitiate the whole of the proceedings and that we ought to uphold the conviction of the appellant having regard to the evidence which was given in the case.

The facts of this case are, extraordinary. The charges are that the head constable and the constable went to the house of the complainant's husband with the main object of ascertaining the whereabouts of a man who was supposed to be connected with a dacoity and who was also supposed to be a paramour of the complainant; that the offences of which these two men were charged were committed on that occasion in day-light with a considerable number of people in the immediate neighbourhood. The woman's story is that the second accused went into her house, her husband having been previously bound in the court-yard of the house by the first accused, and that the second accused ravished her in her house; that the first accused was close by and the ravishing practically took place under his nose, so to speak; that she called out that she was being ravished and losing her honor and begged her husband to pay money to the head constable in order that she might be released from the oppression which was being practised

upon her. Thereupon, her husband begged the first accused to accept money and release his wife and after some haggling as to what the amount should be, the husband of the complainant paid to the first accused the sum of Rs. 80.

As I have already pointed out, the Jury have rejected the charge of rape against the second accused. They have rejected the charge of abetment of rape against the first accused. They have further found the second accused to be guilty of an offence under section 354, which is assaulting a woman with intent to outrage her modesty, but they have rejected the charge of abetment against the first accused: and, the learned counsel for the Crown was constrained to admit that he did not understand how they could find the second accused guilty of an offence under section 354 and at the same time acquit the first accused of the abetment of that offence, which, if it took place at all, must have taken place under the nose so to speak, of the first accused. The facts of this case are so bound up together and the evidence with regard to them is so dependent, one part upon the other, that I find it very difficult to say,—seeing that the evidence with regard to the rape and the abetment of rape is taken by the Jury to be unreliable and seeing that the evidence with regard to the abetment of an offence under section 354 against the first accused is taken by the Jury to be unreliable with regard to the rest of the evidence, that the other charges were made out. In my judgment in this case when part of the evidence as regards the main charges against the accused men must be rejected, it would not be safe to convict the accused upon the rest of the evidence.

For these reasons in my judgment the conviction and sentence of the appellant must be set aside and he must be released. If he is on bail, his bail bond must be discharged.

With regard to the second accused Belat Ali Khan, who has not appealed, the judgment which we have just delivered with regard to the misdirection will affect his case asmuch as the case of the first accused. We asked the learned Deputy Legal Remembrancer if he had anything to say why we should not set aside the conviction in his case also. He having nothing to say, we are of opinion that we ought to exercise the powers vested in us under section 439 of the Criminal Procedure Code and, relying upon the authority of the case of *Broja Rakhal Mozumdar* v. *The Empress* (1), we exercise the powers vested in us under that section and set aside the con-

(1) (1900) 5 C. W. N. 330.

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viction of and the sentence passed on the second accused Belat Ali Khan, and direct that he be released.

Walmsley, J.—I agree.

A. T. M. *Appeal allowed: Convictions set aside.*

Before Sir Lancelot Sanderson, Knight, Chief Justice and Mr. Justice Walmsley.

CRIMINAL.
1920.
February, 18.

HATHIM MONDAL

v.

KING-EMPEROR.*

Penal Code (Act XLV of 1860), Sec. 411—Possession—'Recently' stolen—Reasonable explanation—Burden of proof.

Under section 411 of the Indian Penal Code, the possession of stolen goods by the accused must be possession *soon after the theft* or the stolen goods must have been 'recently' stolen

Where the prisoner is charged with receiving stolen property, when the prosecution has proved the possession by the prisoner, and the goods had been recently stolen, the Jury may be told that they *may*, not that they *must*, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the Jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the Jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the *onus* of proof imposed upon it of satisfying the Jury beyond reasonable doubt of the prisoner's guilt. That *onus* never changes; it always rests on the prosecution: *R. v. Isaac Schama* (1) referred to.

Appeal under section 410 of the Criminal Procedure Code by the Accused.

The accused was charged under section 411 of the Indian Penal Code for dishonestly receiving stolen property, knowing the same to be stolen property. He was convicted and sentenced to 4 years rigorous imprisonment and was ordered under section 565 of the Code of Criminal Procedure to notify his residence and any change of residence after release.

* Application for admission of Criminal Appeal No. 15 of 1920, against the order of G. C. Sankey Esq., officiating Sessions Judge, dated the 23rd December, 1919.

(1) (1914) 11 Cr. App. Rep. 45 (49).

Babu Probodh Chandra Ray for the Appellant.

The judgments of the Court were as follows :—

Sanderson, C. J.—In this case we do not admit the appeal. The charge against the accused was under section 411 Indian Penal Code viz. dishonestly receiving stolen property, knowing or having reason to believe the same to be stolen property.

The only question which had any real importance in this case was the identity of the person who was in possession of the bundle, which contained the stolen articles at Jessore station on the 1st of October last year : and, there is no misdirection, as far as I can see, in the learned Judge's charge to the Jury in that respect. The Jury came to the conclusion that the accused person was the individual who was in possession of the bundle containing the stolen articles on the 1st of October, the burglaries having been committed between the 28th of September and the 1st of October. Therefore, it may be said that the accused was in possession of recently stolen articles. The Jury found that the accused person was in possession of them, and he offered no explanation of such possession. Consequently, we see no reason to admit this appeal.

But there is a passage in the learned Judge's charge which in our judgment is not a correct direction: and, although it is immaterial to this case, we think it is desirable to draw attention to the misdirection, in order that it may not be repeated on subsequent occasions. The learned Judge says this : "It is the business of the prosecution to prove its case entirely ; and no inference should be made against an accused because he examines no witnesses, and does not attempt to explain the evidence against him. But the matter is different in a case under section 411 Indian Penal Code. When it is established that an accused is found in possession of stolen property, it is his business to show that he came by it honestly, and that he did not know that it was stolen property. In the present case the accused denies his possession altogether : he therefore does not make any attempt to show that he was in honest possession of the property." Therefore (unless "there appears strong reason to the contrary) if the jury find that the accused was in possession of the property and that the property was stolen they should presume that the possession of accused was dishonest and that he had reason to believe that the property was stolen." In our judgment, that is not a correct direction. In the first place it is not pointed out that the possession of stolen goods referred to must be possession *soon after the theft*, or that the stolen

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goods must have been "*recently*" stolen. Further, the charge is not in our judgment sufficient in other respects. I think the best way of dealing with it is to draw attention to a judgment of the Lord Chief Justice of England in the case of *R.* v. *Isaac Schama* and *Jacob Abramovitch* (1), and as that book may not be available in all Courts, I propose to read what the Lord Chief Justice said. Having stated the facts, he said: "It is clear that on those facts, and on a proper direction, there was sufficient evidence on which the Jury, if so minded, could convict the appellents. It is admitted by counsel for both appellants that there was evidence to go to the Jury. The case really resolves itself into one question, whether the Judge gave a proper direction to the jury before they arrived at their decision. Cases of this kind have come frequently before this Court complaining of language used by the Judge at the trial in pointing out the principle of law for the guidance of the Jury. It is essential in cases of this character that there should be a careful and proper direction. Where the prisoner is charged with receiving recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the Jury may be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the Jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the Jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the *onus* of proof imposed upon it of satisfying the Jury beyond reasonable doubt of the prisoner's guilt. That *onus* never changes; it always rests on the prosecution. That is the law; the Court is not pronouncing new law, but is merely re-stating it, and it is hoped that this re-statement may be of assistance to those who preside at the trial of such cases." I concur in the Lord Chief Justice's hope that this statement may be of assistance to those who preside at the trial of such cases.

The application for admission of this appeal must be rejected for the reasons that I have already mentioned.

Walmsley, J.—I agree.

A. T. M. *Appeal dismissed.*

(1) (1914) 11 Cr. App. R. 45 (49).

APPEAL FROM ORIGINAL CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Sir Ernest Edward Fletcher, Knight, Judge.

JACOB & CO.

v.

RASH BEHARY GHOSE.*

CIVIL.

1920.

March, 18, 23.

Counsel—Professional work—Litigant, if can instruct counsel—Solicitor—Appeals from mofussil—Professional usage and etiquette—Judge, if can hear a case in which he was Counsel—Judge, if can decide a case, in which he was Counsel for one of the parties in other matters.

The usage and etiquette of the profession require that in all but some exceptional cases, Counsel should not undertake any professional work as regards which the relation of Counsel and client can arise except on the instructions of a solicitor. There is no statutory rule of law to prevent a litigant from instructing Counsel directly or to prevent Counsel so instructed from appearing on behalf of a litigant; but Judges of the highest eminence have emphasized the importance of strict adherence to the long established professional usage in this matter. In the Calcutta High Court, departure from this practice has been allowed only in the case of appeals from the mofussil.

There must be a real and not merely a formal compliance with the requirements of professional usage in this respect, which is "expedient in the interest of suitors and for the satisfactory administration of justice." Consequently, communications should pass between Counsel and attorney, and not between Counsel and the lay client without the intervention of the attorney; otherwise, the salutary principle that the attorney stands between the client and his Counsel in all legal proceedings, might in substance be abrogated by means of personal communications between Counsel and client.

The practice which induces Judges voluntarily to decline to hear cases with which they were connected as Counsel before their elevation to the Bench, is but an evolution of the elementary maxim that no man should be a Judge in his own suit and preside in a case in which he is not wholly free, disinterested, impartial and independent. But this principle has no application when objection is taken to Judge trying a cause on the ground that he had, before his appointment, acted as Counsel in other matters for one of the parties.

The fact that a Judge was, prior to his elevation to the Bench, engaged in the particular cause, is no disqualification, though, according to custom sanctioned by long usage, a Judge would refuse to adjudicate upon a case if he had been engaged as Counsel therein or in a matter intimately connected therewith.

It is no objection to a Judge trying a case that before his appointment he was Counsel in other matters for one of the parties.

Appeal by the Defendants.

Suit for recovery of money due on the sale of shares in the Nalbona Coal Co.

*Appeal from Original Civil No. 98 of 1919, against the decree of Mr. Justice Ghosh.

CIVIL.

1920.

Jacob & Co.
v.
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March, 23.

The material facts appear from the judgment of Mookerjee, J.

Mr. A. K. Ghose for the Appellants.

Messrs. Pugh and Langford James for the Respondent.

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The judgments of the Court were as follows:

Mookerjee, J.—This is an appeal from the judgment of Mr. Justice Ghosh in a suit instituted by the respondent Rashbehari Ghose against the appellant Jacob & Co. for recovery of money due on the sale of shares in the Nalbona Coal Co. When the appeal was called on for final disposal on the 18th March, Mr. Ghosh, counsel for appellant, made an application for adjournment, which was opposed on behalf of the respondent. At the same time, our attention was drawn by Mr. Pugh, the leading counsel for the respondent, to the first ground taken in the Memorandum of Appeal. The application for adjournment did not appear to be reasonable and was refused. Counsel for appellant thereupon stated that he was not prepared to open the appeal, but added that Mr. * * who had conducted the case for the defence in the Court below and had certified the grounds of appeal, might perhaps appear to support them. Mr. * * came later, and intimated that he had not been instructed to proceed with the appeal. In reply to a question put by the Court, with reference to the first ground in the Memorandum of Appeal, he mentioned that he had inserted it on instruction received, not from the Attorney on record, but from one of the partners of the defendant firm. In answer to a further question from the Court as to whether he had, in the Court below, taken exception to the trial of the suit by Mr. Justice Ghosh for the reasons specified in the first ground, he stated that to the best of his recollection objection had not been taken in that precise form; but that he had intimated to Mr. Justice Ghosh that the defendant desired not to have the case tried by him. Mr. Langford James, who had conducted the case in the Court below on behalf of the plaintiff, thereupon stated that Mr. * * had added that his own wishes did not coincide with those of his client, with the result that the trial proceeded in due course. Mr. * * was then asked, why, in view of what had taken place in the Court below, he had included the first ground in the Memorandum of Appeal. Mr. * * answered that the lay client who gave him the instruction assured him that new facts had been discovered which were not known when the trial commenced in the lower Court and which were set out in the first ground of appeal. After this explanation, as Counsel for appellant expressed his inability to proceed with the appeal, we

dismissed the appeal with costs; but we intimated at the same time that we would pass orders later, with reference to the contents of the first ground and the manner in which it came to be inserted in the Memorandum. We shall now proceed to deal with this aspect of the matter; but before we do so, it will be convenient to set out the ground which was in these terms:

"I. For that the learned Judge should not have tried the case at all having regard to the fact that when he was at the bar he was Counsel for Sukhlal Kemani who was the real plaintiff in this case instructed by Messrs. Pugh and Co. in several suits in which the defendant firm were the opposite party, and also having regard to the fact that the very question involved in this case was incidentally raised in one of such suits when the said learned Judge must have received instructions from his said client adverse to the defendant firm and also having regard to the fact that the said learned Judge was Counsel for W. A. Lee in a suit in this Honourable Court which was looked after and managed by the present plaintiff's father Nitye Charan Ghosh who instructed the said learned Judge therein as Counsel."

We are of opinion that when Mr. * * received instruction direct from the client, he acted in contravention of the well-established usage and etiquette of the profession. The usage and etiquette of the profession require that in all but some exceptional cases (which need not be enumerated here, as the present case is not one of them), Counsel should not undertake any professional work as regards which the relation of Counsel and client can arise except on the instructions of a solicitor. There is no statutory rule of law to prevent a litigant from instructing counsel directly or to prevent counsel so instructed from appearing on behalf of a litigant; but Judges of the highest eminence, such as Lord Campbell, C.J. in *Doe d. Bennett* v. *Hale* (1), and Pigot, C. B. in *Hobart* v. *Butler* (2) have emphasised the importance of strict adherence to the long established professional usage in this matter. In this Court, departure from this practice has been allowed only in the case of appeals from the Mofussil: *Gabindo* v. *Hendry* (3); *Moran* v. *Dewan Ali* (4).

It is plain that there must be a real and not merely a formal compliance with the requirements of professional usage in this respect, which, it has been stated, is "expedient in the interest of suitors

(1) (1850) 15 Q. B. 171; 81 R. R. 540. (2) (1859) 9 Ir. C. L. R. 157 (172).
(3) (1875) 14 B. L. R. 12 (App.) (4) (1872) 8 B. L. R. 418.

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and for the satisfactory administration of justice." Consequently, communications should pass between Counsel and Attorney, and not between Counsel and the lay client without the intervention of the Attorney; otherwise, the salutary principle that the attorney stands between the client and his counsel in all legal proceedings, might in substance be abrogated by means of personal communications between counsel and client. Judged by this test, the conduct of Mr. * * cannot possibly be approved.

The gravity of the matter, however, is intensified by the nature of the communication accepted by the counsel direct from his client. On the strength of that communication, Mr. * * inserted in the memorandum a ground which constitutes a libel on the learned Judge in the Court below. There can be no room for controversy that this ground imputes bias and partiality to the learned Judge; this is made clear beyond the possibility of doubt by two other grounds in the memorandum, to which Mr. * * has attached a certificate "that in his opinion the above are good grounds of appeal"—

"13. For that the said learned Judge did not approach or deal with the case in a judicial or unbiased frame of mind but was biased in favour of the plaintiff and against the defendant firm and his judgment was affected and was erroneous as a result thereof."

"24. For that the said learned Judge's dicta regarding the evidence of the defendants and their witnesses and the way they gave it, are the result of bias, and are arbitrary, perverse, and unsupported by any assigned reason or any reason in fact, whereas he should have accepted and acted on the said evidence."

Let us pause for a moment to analyse the contents of the first ground in the Memorandum of Appeal. It is maintained that the learned Judge should not have tried the case for a threefold reason:

(1) That when he was at the Bar, he was counsel for Sukhlal Kernani (who is alleged by the defendant to be the real plaintiff in this case) instructed by Pugh & Co. in several suits in which the defendant firm were the opposite party;

(2) That the very question involved in the present case was incidentally raised in one of such suits, when the learned Judge must have received instructions from his client (Sukhlal Kernani) adverse to the defendant firm;

(3) That the learned Judge was counsel for one W. A. Lee in a suit in this Court which was looked after and managed by the present plaintiff's father Nitaicharan Ghosh who instructed him therein as counsel.

Now, an advocate of Mr. * * 's standing in the profession should have known that the first of these allegations, even if true, is no ground why the learned Judge should not have tried the present case. It is no objection to a Judge trying a case that before his appointment he was counsel in other matters for one of the parties. Indeed, as late as 1859, the House of Lords held that the fact that a Judge was, prior to his elevation to the Bench, engaged in the particular cause was no disqualification, though, according to custom sanctioned by long usage, a Judge would refuse to adjudicate upon a case if he had been engaged as Counsel therein or in a matter intimately connected therewith, *Thellusson* v. *Rendlesham* (1). The observations of Lord St. Leonards, Lord Chelmsford and Lord Brougham in the case just mentioned may be usefully recalled here:

"When these appeals were called on,

Lord St. Leonards took the opportunity of observing that he had been counsel in various branches of this cause on different occasions; in 1825, on the question of the right of presentation to the advowson, and again in 1831 when he argued a point which was not now in dispute; he mentioned these facts, but as he did not conceive that they absolved him from doing his duty in giving advice to their Lordships in the appeal now to be heard, he intended to take part in the hearing.

The Lord Chancellor (Lord Chelmsford) said, there could be no doubt about the propriety of the course adopted by his noble and learned friend, but he felt himself to be in a different position. While at the Bar, he was counsel in the very case, the decision in which was now the subject of appeal, and he should therefore take no part in the judgment upon it. He should merely sit as Lord Chancellor, but should not deliver any opinion.

Lord Brougham trusted that it would not be assumed that having been counsel in a cause operated as a disqualification to prevent the same person, when raised to the Bench, from taking part in the decision of that cause; for, if that was the rule, it might, under certain circumstances, produce terrible delay and expense to the suitor, and even an absolute denial of justice, especially if applied to a Judge of the Court of Chancery. It so happened, that shortly after he became Lord Chancellor, the case of Tatham v. Wright, in which he had been counsel on the Northern Circuit, came before him in Chancery, on a matter which involved the exercise of the Judge's discretion, namely, an application for a new trial. He could

(1) (1858-1859) 7 H. L. C. 429; 115 R. R. 229.

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not have refused to hear it without causing great expense and delay, and almost a denial of justice to the suitor; he therefore heard it; and what he did to satisfy his own mind was this, he obtained the assistance of two learned Judges, Lord Chief Justice Tindal and Mr. Baron Alderson, and having done that, he himself took part in pronouncing the decision.

"The Lord Chancellor feared that he had been somewhat mistaken. He did not suggest that he laboured under any disqualification, for that would be putting the matter much too strongly. If he had been the only Judge having the authority to hear the cause, he should have been in the situation in which Lord Brougham had been in the case of Tatham v. Wright, and should have acted in the same way. Here there were noble and learned Lords who had not been counsel in the case and could hear and decide it, and therefore as a matter of personal feeling he should abstain from taking any part in it."

As illustrations of the statement that if counsel who has advised on or been engaged in a case is raised to the Bench, and the same case comes before him, the practice is for him to refuse to adjudicate on it, reference may be made to *Phillips* v. *Headlam* (1) where Patteson J., and *Lewis* v. *Branthwaite* (2) where Taunton J., gave no opinion, having been counsel in the respective causes. This, however, has not always been so; for in *Townsend* v. *Hughes* (3) Scroggs J. quaintly observed "that he was of counsel with the plaintiff before he was called to the Bench, and might therefore be supposed to give judgment in favour of his former client, being prepossessed in the cause, or else (to show himself more signally just) might without considering the matter give judgment against him; but that now he had forgot all former relation thereunto", and then proceeded to deliver his opinion. But whatever view might have prevailed at one time, the greatest delicacy is now constantly observed on the part of judges when matters come before them, with which they had been connected as counsel before their elevation to the Bench. The practice which induces Judges voluntarily to decline to hear such cases is but an evolution of the elementary maxim that no man should be a Judge in his own suit and preside in a case in which he is not wholly free, disinterested, impartial and independent. But this principle has manifestly no application when objection is taken to a Judge trying a cause on the ground that he had before his appointment, acted as counsel in other matters

(1) (1831) 2 B. & Ad. 380 (385).
(2) (1831) 2 B & Ad. 437 (445).
(3) (1676) 2 Mod. 150 (151).

for one of the parties. As an instance where such an objection was unsuccessfully taken, we may mention the case of *Carr* v. *Fife* (1), where the Supreme Court of the United States negatived the contention and added that the Judge alone could decide for himself whether it was improper for him to sit in trial of the suit. We are clearly of opinion that the first reason included in the first ground of appeal is entirely unsubstantial. The third reason stands on the same footing and is, if possible, even more unfounded. It is solemnly maintained that the learned Judge should not have tried the case, not only because he had been counsel, in some other suit, for the person alleged to be the real plaintiff in this case, but also because he had been counsel in another suit which was looked after by the father of the plaintiff who is said to be only the nominal plaintiff in this litigation. The second reason is based upon an indefinite and unproved assertion, and, as no details are furnished regarding the suit referred to, it is impossible for anybody to test its truth. It is consequently manifest that the first ground in its entirety is not a good ground of appeal as certified by Mr. * * but constitutes a tissue of reckless aspersions on one of the Judges of this Court. We do not overlook or minimise the vital importance of allowing to Counsels freedom and latitude both in speech and in the conduct of the cases of their clients; but, we must hold that in the present instance there has been a flagrant transgression of all conceivable bounds of propriety. We have accordingly anxiously considered whether disciplinary measures should be taken. We have, however, decided, not altogether without hesitation, that we should, on the present occasion, content our ourselves with an emphatic expression of our disapprobation of the conduct of the Counsel concerned, in the hope that the censure which this implies will serve as a warning and prevent the recurrence of similar abuse.

Fletcher, J.—I agree.

J. A. Arnowits: Attorney for the Appellants.

Pugh & Co.: Attorneys for the Respondent.

A. T. M. *Appeal dismissed.*

(1) (1895) 156 U. S. 494.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Walmsley.

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PRAFULLA NATH TAGORE AND OTHERS

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Revenue, settlement of—Beds of public navigable river—Burden of proof—Lands included in Permanent Settlement—Presumption—Survey map—Facts stated on Thak *or survey map.*

Beds of public navigable river are the property of the Crown.

A party alleging that at the time of the Permanent Settlement, the disputed lands were included in permanently settled estates and were settled with his predecessors as part and parcel of the estate granted to him, must prove it. The burden of proof lies on him, on the principle that if his allegation is not made out, the decision of the revenue authorities is not displaced and remains unaffected.

A survey map may be presumed to be correct when made and to furnish valuable evidence of the state of things at that time. But this does not necessarily enable a party who asserts that a particular parcel of land was assessed with revenue in 1793, to discharge the burden which lies upon him to establish the affirmative of this proposition.

The question whether the facts stated on a *thak* or survey map were in existence, is essentially one of fact and should be determined on the facts and circumstances of each case.

Where the plaintiffs sue the Government for wrongful assessment of lands alleged to be part of their permanently settled estate, it cannot be laid down *a priori* that the relevant survey maps are or are not sufficient to shift the *onus* on to the defendant.

Appeals by the Plaintiffs.

Suits for declaration that the disputed lands in each suit were included in permanently settled estates held by them, that they were not liable to be assessed, as they were assessed, with revenue by the Collector under the Bengal Alluvion and Diluvion Act, 1847, and for consequential reliefs.

The material facts are stated in the judgment.

Babus Dwarka Nath Chuckerbutty, Broja Lal Chuckerbutty, Hiralal Chuckerbutty and *Pankaj Kumar Ganguli* for the Appellants.

Babus Ram Charan Mitra and *Sris Chunder Chaudhuri* for the Respondent.

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* Appeals from Original Decrees Nos. 12 and 127 of 1918, against the decision of Babu Monmohan Niyogi, Subordinate Judge of Backerganj, dated the 27th August, 1917.

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The judgment of the Court was delivered by

Mookerjee, J.—The litigations which have culminated in these two appeals were commenced by the appellants against the Secretary of State for India in Council, for declaration that the disputed lands in each suit were included in permanently settled estates held by them, that they were not liable to be assessed, as they have been assessed, with revenue by the Collector under the Bengal Alluvion and Diluvion Act, 1847, and for consequential reliefs. The defence of the Secretary of State in substance was that the disputed lands were not settled with the predecessors of the plaintiffs at the time of the Permanent Settlement and that they lay, at that time, in the bed of public tidal navigable rivers. The Subordinate Judge has dismissed the suits on the ground that the plaintiffs had failed to prove that the lands were included in the permanently settled estates held by them, and that consequently the proceedings for assessment of revenue could not be deemed illegal and without jurisdiction. This conclusion has been assailed before us as opposed to the facts established by the evidence and to well-recognised principles of law.

The lands in suit No. 5 of 1915 and appeal No. 12 of 1918 are claimed as part of the permanently settled estate No. 2699; they have been formed by the recession of the rivers Kaliganga and Dhulia and are situated in Mouzas Bhatsala, Nailtala and Chota Buichakati. The lands in suit No. 6 of 1915 and appeal No. 127 of 1918 are alleged to appertain to the permanently settled estate No. 2694; they have emerged out of the bed of the river Charamuddi and are situated in Mouzas Char Hijaltala, South Char Hijaltala and Chandpura. It will be convenient to refer to the facts of the two suits separately.

As regards the first suit, there can be no doubt that the disputed lands did in recent times form part of the beds of the rivers Kaliganga and Dhulia and are now dry lands because the rivers have receded from their former beds. The substantial question in controversy is whether at the time of the Permanent settlement, these river beds were settled with the predecessors of the plaintiffs as part and parcel of the estate granted to them. The plaintiffs can succeed, only if they can establish the affirmative of this proposition. The burden of proof lies on them, on the elementary principle that if their allegation is not made out, the decision of the revenue authorities is not displaced and remains unaffected. The Permanent settlement papers have not been produced in this suit. The plaintiffs have consequently been

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constrained to rely upon the thak and survey maps, made in 1859 and 1860. On a scrutiny of these maps, two cardinal facts are discovered, which have an important bearing upon the solution of the controversy between the parties.

In the first place, it is clear that the river Dhulia which adjoins Bhatsala as also the river Kaliganga (sometimes called Adajuri) which passes by Mouzas Nailtala and Chota Buichakati, were both large tidal navigable rivers at the time of the surveys. The Kaliganga was 405 feet wide, while the breadth of the Dhulia at different places was 810, 960 and 1200 ft. respectively. The plaintiffs have endeavoured to negative the effect of this evidence, by an assertion that at the time of the Permanent Settlement these rivers were narrow channels; no evidence has been adduced in support of this allegation. The oral evidence, as might have been anticipated, is of no value. On the other hand, Rennell's map which is based on surveys made between 1764 and 1773, and has been produced on behalf of the Secretary of State, indicates the existence of Kaliganga and Dhulia as large navigable rivers in those days. The map of Alexander Hodges prepared in 1831, in so far as any conclusion can be drawn therefrom regarding the general outlines of the locality, indicates that at that time Jhulia was a large navigable river. The conclusion may, consequently, be drawn with approach to such certainty as may reasonably be expected in this class of cases, that Dhulia and Kaliganga were large tidal navigable rivers at the time of the Permanent Settlement. In this connection, it is important to bear in mind that when the matter was under consideration by the revenue authorities, the Collector overruled the contention that the Kaliganga river was not a public navigable channel at the time of the Permanent Settlement, on the ground that the present plaintiffs had produced no evidence to support their allegation. When the case was taken on appeal to the Board of Revenue, the view of the Collector was not seriously challenged; it was indeed explicitly stated in the order of the 26th December, 1913, that "there is not a shadow of a doubt, and this point has not been questioned at the hearing before the Board, that the Kaliganga river was a large navigable one at the time of the Permanent Settlement." In the face of this order, it was of vital importance for the plaintiffs to produce evidence, as nearly as possible conclusive in character, that the Dhulia and the Kaliganga were not at the date of the Decennial or the Permanent Settlement (1789-93)—as they undoubtedly were at the time of the thak and revenue surveys (1859-60)—public tidal navigable rivers. This the plaintiffs have completely failed to

establish; it is clearly not sufficient for them to reiterate, without the support of tangible evidence, a contention which was found untenable by the Collector and was practically abandoned before the Board of Revenue. We must accordingly proceed on the basis that the Dhulia and the Kaliganga were, at the time of the Permanent Settlement, public tidal navigable rivers. This necessarily carries the implication that the river beds were then the property of the Crown, and, it must be deemed *prima facie* improbable, unless there is satisfactory evidence to the contrary, that they were settled with a private individual. We must now investigate whether such evidence has been produced, and this brings us to the consideration of the second fact alleged by the plaintiffs to be deducible from an inspection of the thak and survey maps.

In the second place, the thak and survey maps show that the rivers Kaliganga and Dhulia were included within the boundary of estate No. 2699. On this, the plaintiffs base their contention that the river beds must have been settled with their predecessors as part of their permanently settled estate, as the thak and revenue survey maps furnish *prima facie* reliable evidence of the condition of things at the time of the Permanent Settlement. This, indeed, is the sheet anchor of the claim put forward by the plaintiffs in these litigations. The identical argument had been pressed without success before the revenue authorities and proved equally unavailing before the Subordinate Judge. The Settlement officer stated in his order of the 10th November, 1911, that "for convenience of measurement, most of the tidal navigable rivers were included in the Mouzas through which they passed" and added that "assuming that the revenue and thak maps show that this navigable river was included in the Mouzas as surveyed in the thak and revenue surveys, it does not follow that the river was settled as part of the estate at the time of the Permanent Settlement." When the question was ultimately mooted before the Board of Revenue, Mr. D. J. Macpherson, Member of the Board, with his large experience of revenue matters, made the following observations:

"The main objection pressed before the Board is that river Kaliganga was included in the above Mouzas at the time of the Thak and Revenue Surveys, as the maps of these Surveys show. These Mouzas lie only on one bank of the river and it is true that the maps show lines taken across the river at the extremities of the Mouzas. This was not an unusual practice at these Surveys in various parts of Bengal and Bihar, and if one thing is more certain than another, it is that it was not due to any idea that the bed of

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the river really formed part of the riparian Mouzas. The lines were taken across the large rivers simply to connect up the Survey stations on both banks. It is absurd to suppose that at the time of the Revenue Survey the whole land of this wide navigable river was included within the ambit of these Mouzas situated only on one bank of it. Had the lines been intended to mark the real boundaries of Mouzas, they would have shown part of the bed of the river as included also in the Mouzas on the other side of the river. The Decennial Settlement papers do not show that the bed of the river was included within the estate of the objector."

It is remarkable that the plaintiffs have made no attempt whatsoever to minimise, much less to neutralise, the effect of this weighty pronouncement. The burden rested upon them to establish that the conclusion of the revenue authorities was vitiated by a fundamental error; this burden has clearly not been discharged by the mere repetition of a contention which was rejected as groundless by the revenue authorities. On the other hand, the decision of the Judicial Committee in *Jagadindra* v. *Secretary of State* (1), as we shall presently see, supports the view adopted by the revenue authorities and by the Subordinate Judge.

In the case just mentioned, the plaintiff contended before the primary Court that as the survey maps showed that the entire bed of the river Brahmaputra was within his estate, the lands in the bed of the river must be taken to have been settled with his predecessors at the time of the Permanent Settlement. The Subordinate Judge gave effect to this contention on the ground that, according to the decisions in *Ramjewun* v. *Collector of Shahabad* (2); *Sarat Sundari* v. *Secretary of State* (3); *Syama Sundari* v. *Jogobundhu* (4), and *Satcowri* v. *Secretary of State* (5), the Thak and survey boundaries show the boundaries of permanently settled estates. The District Judge on appeal dissented from this view and in reversing the decision of the trial Judge observed as follows:

"The facts that the river passed through some of these estates in 1852 and that the area of the water was calculated and the whole shown in the one survey map of the village, are not, as far as I am aware, any admission by the appellant (the Secretary of State) that the river was part of the estate; it was shown together with the estate, and the two areas were calculated together or rather in the same map, purely for statistical purposes and for convenience."

(1) (1902) L. R. 30 I. A. 44; I. L. R. 30 Calc. 291.
(2) (1873) 19 W. R. 127.
(3) (1885) I. L. R. 11 Calc. 784.
(4) (1888) I. L. R. 16 Calc. 186.
(5) (1894) I. L. R. 22 Calc. 252.

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On second appeal to this Court, it was urged that the District Judge had committed an error of law in misconstruing the maps and in refusing to give them their legal effect. Macpherson and Hill, JJ. overruled this contention and held that the District Judge had not committed any error of law in refusing to hold "that the Thak and survey maps furnish in themselves sufficient proof of the plaintiff's case, because they show that the river then flowed through or alongside the villages in question and that it was included in the Mouza both according to the map and the surveyed area as stated in it." The Court added that the District Judge was right in saying that the statements in the map did not amount to an admission, on the part of the Government, of the fact which it was necessary for the plaintiff to prove. The maps might be evidence against the Government to the same extent that they would be evidence against the proprietor of an adjoining estate; and assuming them to be so and that they showed that the large navigable river was included in the Mouzas as surveyed, it did not follow that the river was settled as a part of the estate at the time of the Permanent Settlement. The maps were evidence of possession at the time when they were made and as such might be evidence of title, but they were not in themselves necessarily sufficient to prove the plaintiff's case. The second appeal to this Court was consequently dismissed. The case was ultimately taken before the Judicial Committee, where Lord Lindley observed that when the question arises whether lands shown on a particular Thak or survey map made since 1793 were or were not included in the lands charged with the assessment permanently fixed in 1793, the Judge of first instance cannot in point of law be directed that he ought in all cases to act on the last Thak or survey map and to treat it as decisive in the absence of evidence to the contrary. It could not certainly be assumed that the disputed lands were dry land in 1793 or that the land forming the bed of a public navigable river was included in the assessment then permanently fixed. In this view, the Judicial Committee held that on the evidence as it stood, the decision of the District Judge was right and was not vitiated by an error in point of law. It is manifest that the case before us presents in many respects a singular family likeness to the case before the Judicial Committee.

Our attention has been invited to the decision in *Nobo Coomar* v. *Gobind Chunder* (1), to show that a survey map is good evidence of possession according to the boundary demarcated thereupon. This is not disputed, and a survey map may be presumed to be

(1) (1881) 9 C. L. R. 305.

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correct when made and to furnish valuable evidence of the state of things at that time. But this does not necessarily enable a party who asserts that a particular parcel of land was assessed with revenue in 1793, to discharge the burden which lies upon him to establish the affirmative of this proposition. The decisions in *Kali Krishna* v. *Secretary of State* (1); *Abdul Hamid* v. *Kiran Chhindra* (2); *Maisuddi* v. *Ishan* (3); *Gokul Chandra* v. *Hara Sundari* (4); *Ananda Hari* v. *Secretary of State* (5); *Dumne* v. *Dharani Kanta* (6); *Fashur Rahim* v. *Nabendra Krishna* (7); *Syam Lal* v. *Lachman* (8); and *Haradas* v. *Secretary of State* (9); do not lay down any general inflexible rule of law that the facts stated on a Thak or survey map must be presumed to have been in existence at the time of the Permanent Settlement. The question is essentially one of fact and must be determined on the facts and circumstances of each case. Where, as here, the plaintiffs sue the Government for wrongful assessment of lands alleged to be part of their permanently settled estate, it cannot be laid down *a priori* that the relevant survey maps are or are not sufficient to shift the onus on to the defendant. The decision in *Secretary of State* v. *Bijaychand* (10) is of no real assistance in this connection, as the river in that case was not navigable, and there were indications, that the revenue derived from the river (such as water duties and ferry income) entered into the calculation when the Government Revenue was settled.

We hold accordingly that the Subordinate Judge has correctly held that the plaintiffs have failed to prove that the disputed lands formed an integral part of their permanently settled estate.

We have next to consider the lands in dispute in suit No. 6. The mouzas in that litigation are on the bank of the river Charamuddi. That river was 660 ft. broad at the time of the Revenue Survey and was doubtless a large navigable tidal river. Indeed, it was not seriously denied before the revenue authorities that the river had been tidal and navigable from the time of the Permanent Settlement, as is amply indicated by the maps of Rennel and Hodges. Here also the question arises, whether the delineation of the boundary in that thak and survey maps justifies the inference that the river bed was included in the permanently settled estate held by the plaintiffs. The only distinction between the two cases

(1) (1888) I. L. R. 16 Calc. 173; L. R. 15 I. A. 186.
(2) (1903) 7 C. W. N. 849. (3) (1910) 13 C. L. J. 293; 15 C. W. N. 706.
(4) (1904) 9 C. W. N. 383. (5) (1905-6) 3 C. L. J. 316 (326).
(6) (1908) I. L. R. 35 Calc. 621. (7) (1912) 17 C. W. N. 151.
(8) (1888) I. L. R. 15 Calc. 353. (9) (1917) 26 C. L. J. 590 P. C.
(10) (1918) 22 C. W. N. 872.

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is that here the boundary line of the mouzas does not include the whole of the river bed but passes through it. This, in our opinion, makes no substantial difference, as there is no indication that what formed the bed of a large public tidal navigable river at the time of the Permanent Settlement was settled with the private individuals who became proprietors of the dry lands on the two banks. Consequently, here also, as in the case of the rivers Kaliganga and Dhulia, we must hold that the plaintiffs have failed to prove that the disputed lands were in 1793 included in their permanently settled estate.

There is only one other point which requires mention. The plaintiffs have argued that even on the assumption that their main contention has failed, they have proved that the revenue authorities have assessed revenue on what was dry land in 1793. We have carefully examined the maps and have arrived at the conclusion that there is no foundation for this contention. The report of the Commissioner and the facts elicited in his examination in Court, do not inspire absolute confidence in his proceedings, and we are not prepared to hold that they throw any doubt upon the accuracy of the work of the revenue authorities. Nor are we prepared, in view of what took place in the Court below, to direct a fresh enquiry and reconsideration of the whole case.

The result is that these appeals fail and are dismissed with costs. The hearing fee in No. 127 is assessed at three gold mohurs.

A. T. M. *Appeals dismissed.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge and Sir Ernest Edward Fletcher, Knight, Judge.

MOHARAJA MANINDRA CHUNDRA NUNDY, BAHADUR

v.

CHANDI CHARAN BANNERJEE.*

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1920.
January, 29.
1919.
December, 5, 12.

Suit, maintainability of—Letters Patent cl. (12)—"Carry on business."—Rights given under agreement—Civil Procedure Code (Act V of 1908) O. 7 R. 10(1) O. 49 R. 3—Plaint, return of—Suit instituted in the original side of High Court.

* Appeal from Original Order No. 79 of 1919, against the decision of Mr. Justice Greaves, dated the 30th July, 1919.

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The expression "Carry on business" in clause 12 of the Letters Patent of the Calcutta High Court, is a very elastic one, almost incapable of definition, so that the tribunal must in each case look to the particular circumstances: *Goswami Girdhariji* v. *Govardhanlalji* (1).

A suit was brought for recovery of damages for breach of contract in the original side of the Calcutta High Court. The defendant, who was the owner of several collieries in Jheria and in the Raneeganj coal fields situated in the Burdwan district, did not reside within the jurisdiction of the Court. The defendant in 1911 appointed Messrs. H. V. Low & Co. as his managing agents for all his collieries in the Jheria and Raneeganj coal fields. The firm was a private limited liability company, having an office at 12 Dalhousie Square, Calcutta, and acting as managing agents for various concerns. By a memorandum of agreement entered into between the defendant and the company (H. V. Low & Co.) the sole, absolute and unfettered control of the management and working of the collieries and of the sale of the output thereof, were conferred on the firm, during the continuance of the agreement:

Held, that the defendant was not liable to be sued on the original side of the High Court, as he could not be said to carry on business in Calcutta, merely because he granted certain rights to Low & Co. under the said agreement.

Under order 49 rule 3 of the Code of Civil Procedure order 7 rule 10 (1) being inapplicable, an order for return of the plaint for presentation to the proper Court, in suits instituted on the original side of the High Court cannot be made.

Appeal by the Defendant.

Suit for recovery of damages for breach of contract,

The material facts appear from the judgment of

1919.

July, 30.

GREAVES, J.—In this suit the plaintiff sues to recover from the defendant damages which he alleges that he has suffered by reasons, I understand, of a lease, which he held from the defendant of certain coal lands having been wrongfully terminated by the defendant.

A preliminary objection is taken by the defendant to the hearing of the suit, namely, that this Court has no jurisdiction to entertain the suit. The point really turns on an agreement of the 24th June, 1911, made between the defendant Maharaja of the one part and Messrs. H. V. Low & Co, of the other part. The plaintiff contends that by virtue of this agreement the Maharaja is carrying on business within the jurisdiction of this Court within the meaning of that phrase in clause 12 of the Letters Patent of 1865. The defendant on the other hand contends that by virtue of that agreement he cannot be deemed to be carrying on business within the meaning of clause 12. It is admitted that the Maharaja resides outside the jurisdiction of this Court and that unless he is carrying on business

(1) (1893) I. L. R. 18 Bom. 294; L. R. 21 I. A. 13.

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by virtue of the agreement of the 24th June 1911 this Court has no jurisdiction to entertain the suit.

By the agreement of the 24th June, 1911, by clause 1 the Maharaja appoints Messrs. H. V. Low & Co. of 12 Dalhousie Square as the managing agents of all his collieries a list whereof is set out in the schedule thereto. By clause 3 it is provided that Messrs. H. V. Low & Co. shall during the continuance of the agreement have the sole absolute and unfettered control of the management and working of the said collieries and of the sale of the output thereof. By clause 4 it is provided that Messrs. H. V. Low & Co. shall undertake the management of the collieries as therein stated and that they shall be responsible for and indemnify the Maharaja against all claims and demands whatsoever in respect of the non-delivery or short delivery of coal or of demurrage on waggons or bad or underloading. By clause 5 Messrs. H. V. Low & Co. are to provide at their own expense the necessary staff for the collieries and stores and implements for raising the coal and selling the output thereof, and of generally conducting the management including the payment of the costs of the establishment of their Calcutta office. Clause 6 provides that Messrs. H. V. Low & Co. shall at all times during the continuance of the agreement use their best endeavours to raise the largest amount of coal and to sell the same at the best available prices, and clause 7 sets out the minimum prices at which the firm undertake to sell the steam coal and hard coke therein referred to. Clause 8 provides for the retention by Messrs. H. V. Low & Co. of the cost of working at certain rates therein specified. Clause 9 provides that Messrs. H. V. Low & Co. are to pay to the Maharaja five annas six pies for each ton of rubble smithy dust and slack coal raised and despatched by them irrespective of the cost of raising the same, and the clause further provides that the firm are to be entitled to this coal after the payment of five annas six pies per ton to the Maharaja. Clause 10 provides for the payment of certain commissions on coal to Messrs. H. V. Low & Co. for their management of the collieries and for their conduct of the sale of the coal. Clause 11 provides for Messrs. H. V. Low & Co. keeping full and correct accounts of the sale of coal. Clause 12 provides for the minimum quantity of coal to be raised and for the payment to be made to the Maharaja upon the basis of this minimum. Clause 20 provides that Messrs. Low & Co. shall regularly despatch and deliver coal to different parties in pursuance of certain contracts already entered into by the Maharaja and that the firm are to be entitled to their commission upon such coal and they are bound to make good to the Maharaja

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the loss suffered by him for non-delivery of such coal or non-fulfilment of the contracts.

I have before me one of the contracts entered into by Messrs. H. V. Low and Co. in respect of the sale of coal from one of the Maharaja's collieries and admittedly all contracts are entered into by Messrs. H. V. Low and Co. at their office in Dalhousie Square and are similar in form *mutatis mutandis*. The contract is produced by Mr. Pattinson who at the date of the contract was a partner in the firm of H. V. Low and Co. which is now a limited private company. Now this contract is between the East Indian Railway by their agent of the one part and Messrs Low and Co. who are described as the managing agents of the Ekra Khas Colliery of the other part. It is not necessary for me to refer to the clauses of the contract in detail except to clause 7 which provides that if the contractor fails to deliver any coal in the quantities and at the time and in the manner provided in the contract he is to make good to the company the loss sustained by the company upon the terms therein stated. I think it is clear from the cases to which I have been referred that in order to carry on business within the meaning of that phrase in clause 12 of the Charter it is not necessary that any one should personally carry on business himself. I need only refer to three cases cited before me: *Chinnammal* v. *Tubakannatammal and others* (1), to *Muthaya Chetti* v. *John Harrison Allan* (2), and to *Kessowji Damodar Jairam* v. *Khimji Jairam* (3). In the case of *Chinnammal* (1), the defendant consigned goods from the moffusil to Madras for sale by a general agent, and it was there held that under the circumstances set forth in the case the defendant did not carry on business within the jurisdiction of the Madras High Court. In the case of *Muthaya* (2) the defendant there had agents in various places in India and was sued upon Charter party made at Calcutta by one of his agents in respect of a ship lying at Madras; it was held in that case, the terms of the contract are not stated in the report, that the defendant was carrying business within the jurisdiction of the Madras High Court. In *Gosami Shri 108 Shri Girdharji Maharaj* v. *Shri Govardhanlalji Giridharijii* (4), it is stated in the judgment at page 298 that the phrase "carry on business" in clause 12 of the Charter of the Bombay Court which contains the same words as clause 12 of the Charter is a very elastic one and incapable of definition, but that the tribunal must in each case look to the particular circumstances and then the passage goes

(1) (1866) 3 Mad. H. C. R. 146.
(2) (1880) I. L. R. 4 Mad. 209.
(3) (1888) I. L. R. 12 Bom. 507.
(4) (1893) I. L. R. 18 Bom. 294.

on in these terms "It appears to their Lordships that the Letters Patent intended it to relate to business in which a man might contract debts, and ought to be liable to be sued by persons who had business transactions with him."

I now return to the agreement of the 24th June, 1911. On behalf of the Moharaja it is said that by virtue of that agreement he had no control over the selling of the coal by Messrs. H. V. Low and Co. and that they were merely persons who were selling coal on commission for him and that that does not make him personally carry on business within the jurisdiction within the meaning of the decided cases.

On behalf of the plaintiff it is said that having regard to the terms of clause 4, namely the indemnity to the Moharaja and the difference that is drawn between the steam coal referred to in clause 7 and the rubble smithy dust and slack coal referred to in clause 9, that it is clear that in respect of the steam coal at any rate Messrs. Low and Co. were not general agents of the Moharaja, but were his special agents under the terms of the contract, and although they might be under the terms of clause 4 liable to indemnify him as between him and themselves yet that in respect of the contracts for the sale of coal the Moharaja remained a principal and must therefore be deemed to be carrying on business within the meaning of clause 12 of the Charter. I think having regard to the form of the contract which is exhibit 1 and to which I have already referred that the contention of the plaintiff is correct. It seems to me that the contracts entered into, of which exhibit 1 is a sample, were entered into by Messrs. H. V. Low and Co. as managing agents in respect of certain collieries named in the contracts. Having regard to the terms of clause 230 of the Indian Contract Act it seems to me that although the other contracting party under the agreement in exhibit 1 might have had a right of recourse against the managing agents they were not precluded if it became necessary from proceeding under the contract against the person who owned the Ekra Khas Colliery Co. who admittedly is the Moharaja. Under these circumstances it seems to me that within the meaning of the passage to which I have already referred *Gosami Shri 108 Girdharji* v. *Shri Govardhanlalji* (1) the Moharaja was a person liable to be sued by the person who entered into contracts with his managing agents and that consequently he falls within the provisions of clause 12 of the Charter as carrying on business within the jurisdiction of this Court. I so hold having regard to the agreement of agency

(1) (1893) I. L. R. 18 Bom. 294 (298).

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Greaves, J.

and the form of contract entered into by the agents. I accordingly hold that the preliminary objection fails and that the suit must proceed.

Against this decision, the defendant appealed.

Mr. A. N. Chaudhuri (with him *Messrs. B. Chakrabutty, B. K. Lahiri* and *H. K. Mitter*) for the Appellant.

Messrs. N. Sarkar and *S. C. Bose* for the Respondent.

C. A. V.

January, 29.

The judgments of the Court were as follows:

Mookerjee, J.:—This is an appeal under clause 15 of the Letters Patent against a judgment of Mr. Justice Greaves determining that this Court in the exercise of its ordinary original civil jurisdiction is competent to entertain the suit under clause 12 of the Letters Patent. The suit was instituted on the 8th January, 1915, for recovery of damages for breach of a contract alleged to have been entered into between the plaintiff and the defendant on the 19th December, 1912. The case for the plaintiff is that the contract was wrongfully broken by the defendant on the 26th January, 1913, and that he has thereby suffered loss to the extent of Rs. 5,24,300. The defendant does not reside within the jurisdiction of this Court and it is not disputed that this Court has no jurisdiction to entertain this suit unless it is established that the defendant carries on business within the local limits of the ordinary original jurisdiction of the Court within the meaning of clause 12 of the Letters Patent.

The defendant is the owner of several collieries in Jheria and in the Raneegunj coal fields situated in the district of Burdwan. On the 24th June, 1911, the defendant appointed Messrs. H. V. Low & Co. as his managing agents for all his collieries in the Jheria and Raneegunj coal fields. The firm is a private limited liability Company, having an office at 12 Dalhousie Square, Calcutta, and acting as managing agents for various concerns. The case for the plaintiff is that by virtue of the memorandum of agreement between the defendant and the company, the defendant must be deemed to carry on business in Calcutta within the meaning of clause 12 of the Letters Patent. The expression "carry on business" is not defined in the Letters Patent, and, as was observed by Lord Morris in *Goswami Girdharji* v. *Govardhanlalji* (1), where the Judicial Committee affirmed the decision of the Bombay High Court in *Shri Gosvami* v. *Govardhanlalji* (2), the phrase is a very

(1) (1893) I. L. R. 18 Bom. 294: L. R. 21 I. A. 13.
(2) (1890) I. L. R. 14 Bom. 541.

elastic one, almost incapable of definition, so that the tribunal must in each case look to the particular circumstances. In the case then before the Judicial Committee, the question arose whether the high priest of a shrine who received personal offerings in money from his followers could be said to carry on business. The question was answered in the negative and it was with reference to such offerings that the Judicial Committee observed that the phrase 'carry on business' was intended to relate to business in which a man might contract debts and ought to be liable to be sued by persons who had business transactions with him. The facts of the case before us are fundamentally different from those of the case before the Judicial Committee, and we must determine with regard to its particular circumstances, whether the defendant can fairly be said to carry on business in Calcutta by reason of the memorandum of agreement between him and Low & Co.

We have carefully examined the various clauses of the agreement which confers on the firm, during the continuance of the agreement, the sole, absolute and unfettered control of the management and working of the collieries and of the sale of the output thereof. We have also considered the contract between Low & Co. and the East Indian Railway Co. dated the 26th July, 1915. We are unable to hold that the defendant can be said to carry on business in Calcutta, merely because he granted certain rights to Low & Co. under the agreement already mentioned. Our conclusion is that the plaintiff has failed to satisfy the Court that the defendant is liable to be sued on the original side of this Court.

The result is that this appeal is allowed with costs both here and in the Court below.

The suit will stand dismissed.

Sanderson, C. J.:—I agree.

Fletcher, J.:—I agree.

Messrs. Watkins & Co.: Attorneys for the Appellant.

R. C. Bose:—Attorney for the Respondent.

A. T. M. *Appeal allowed*: *Suit dismissed.*

[An application for review was made on the 1st March, 1920, on the ground that the Court should have ordered the plaint to be returned for presentation to the proper Court.

Mr. S. C. Bose for the Respondent Petitioner: relied on order 7, rule 10(1) of the Code of Civil Procedure and referred to *Lodna Colliery Co. Ld.* v. *Bepin Bihari Bose* (1), where Fletcher J. made an order for return of the plaint.

(1) (1912) I. L. R. 39 Calc. 739.

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Mr. A. M. Chaudhuri for the Appellant Opposite Party: pointed out that under O. 49, rule 3 of the Code of Civil Procedure, order 7 rule 10(1) was inapplicable to suits instituted on the original side of the High Court, and stated that as the point had not been argued in *Lodna Colliery Co. Ld.* v. *Bipin Bihari Bose* (1), the order in that case for the return of the plaint must be deemed to have been made by oversight.

The Court thereupon dismissed the application for review with costs.—Rep.]

(1) (1912) I. L. R. 39 Calc. 739.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Sir Earnest Edward Fletcher, Knight, Judge.

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January, 13.

BEPIN BEHARY SEN

v.

THE TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA AND OTHERS.*

Building sites—Calcutta Improvement Act (V B. C. of 1911), Sec. 39—Plan, if to be delineated before sanction of scheme—Enquiry under sub-section (2) of section 78 of the Calcutta Improvement Act, if disentitles the Trust to reject the application subsequently.

The Board of Improvement Trust are not required to delineate on the plan the building sites before the scheme is submitted to Government for sanction.

The fact of Board's making enquiries under sub-section 2 of section 78 of the Calcutta Improvement Act, does not disentitle them ultimately to reject the application on the ground that it does not come within sub-section 1 of that section.

Appeal by the Plaintiff.

Suit to test the validity of an order made by the Calcutta Improvement Trust rejecting the plaintiff's application for exemption under section 78 of the Calcutta Improvement Act.

The material facts appear from the judgment dismissing the suit, of Mr. Justice Rankin, which was as follows:

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Rankin, J.:—In my opinion the defendants the Calcutta Improvement Trust, must be dismissed from this action with costs.

* Appeal from Original Decree No. 83 of 1919, against the decree of Mr. Justice Rankin, dated the 30th July, 1919.

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The plaintiff's claim as against them is in respect of two houses, called 41-3-2, Jelialolla Street and 7-1 Jorapuker Lane, which, though they do not abut upon, are very closely adjacent to a new Street known as the Central Avenue, brought into existence by the Improvement Trust under a New Street Scheme known as Scheme No. 7. These premises are in this position, that No. 41-3-2 is removed by a small strip from what I will call the building line, the outside edge of the proposed new Street, and as regards premises No. 7-1, that is removed by a strip that is rather larger. No part of the face of either of these two properties comes up to the line which is to mark the outside edge of the new Street, there being therefore an irregular strip of land between the plaintiff's premises and the new building line. In these circumstances what happened was that "the plaintiff in due time made an application under section 78 of the Calcutta Improvement Trust Act and it is because this application under section 78 was wrongly rejected, (in fact it was rejected on the 18th December), that he brings this action. The reason given for rejecting the plaintiff's application was that the holding did not fit in with the lay out" but at the same time an offer of reinstatement in Bhowanipore was given to the plaintiff which offer he was not obliged to accept. At the hearing before me the case looked as if it might bristle with other difficulties besides the question whether or not that rejection was wrongful, but owing to the action of the Improvement Trust in saying that if it is ultimately held in this proceedings that they have acted wrongly, they will, when they get the land from the land Acquisition Collector return it to the plaintiff, it is unnecessary for me to enter into legal points arising on the question whether the plaintiff has claimed a proper form of relief, joined the proper parties etc. The issue I am confining myself to is whether the rejection of the plaintiff's application under section 78 was wrongful or not and it is by agreement that the matter has been reduced to that.

Section 78 on the face of it applied only to places whether the local Government has sanctioned the acquisition of land in any area comprised under an Improvement Scheme and whether the land is not required for the execution of that Scheme. The point therefore upon which the plaintiff has to satisfy me, is, that the land which is his own property is not required for the execution of the scheme which is sanctioned by the Government. For that purposes the first thing the plaintiff has to do is to produce the scheme and put in evidence showing the Government sanction and he has put in evidence a document Exhibit F as being the Scheme. In the cross-

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examination of Mr. Bompas, one of the witnesses for the defendants; he obtained the admission that in the strictest sense of the expression, probably from paragraph 6 on page 8 down to a few lines from the bottom of page 13 may be said in a special sense to be the scheme if it is taken together with the plans, which have been put in evidence. On these materials I ask myself, Am I satisfied on that, that the plaintiff has proved to me that his land was not required for the execution of the scheme. Now in the first place the plaintiff has endeavoured to succeed by complaints as regards the form in which the scheme has been produced. I could suggest improvements as to compliance with the local Act as regards the scheme and I have no doubt that the persons who are more intimately concerned with the matter than I am might usefully give a little time and trouble to this matter. But what is quite certain is that whenever the local Government has sanctioned an Improvement scheme, that is conclusive evidence that the scheme has been duly framed and sanctioned. I am not therefore concerned with the question whether the scheme ought not to have been framed as it has been. I have got to take the scheme as it stands; what is more, the plaintiff has got to take the scheme as it is; and has to satisfy me on that, that this land was not required for the execution of that scheme.

Now if I confine myself for the present to that part of the scheme on pages 8 to 13 of Exhibit F, I find it is laid down there that building sites provided will be plotted in accordance with public demand "It should be said generally that there should be a ready market for plots from 6 cottahs to 1 bigha." I find secondly that in the estimate which immediately follows on page 9 there is a nett expenditure of 13¼ lacs contemplated; that the gross value of the land is put as 44 lacs. Recovery 30½ lacs, balance 13¼ lacs is put opposite the word "nett." Mr. Bompas informed me that it is upon the basis that all the land scheduled is going to be acquired and none of it is going to be returned and that it is going to be dealt with for the purpose of building sites—to be sold or leased out to persons who desire to deal with Improvement Trust in respect thereof. It is on the assumption that no land is going to be released upon special terms and that it is all going to be dealt with. Now these are the two indications which are important when I come to look at the plan and to take that plan in connection with the scheme. In so doing I find the plan provides for a road in the middle of the scheduled area and at a distance which is more or less at an even distance on every side, there comes a blue verge at the extreme edge of the area which it is proposed to acquire. Mr. Bompas says that

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the whole meaning of the scheme originally was that the part between the edge of the road and the extreme verge of acquisition are the building sites which are spoken of. These plans show that a large number of these building sites could be added and divided up into sites of one size or another. Mr Pugh says that the numbers have reference to the property as it exists to-day. That is equally true of the property that is going to be made part of the road as it is of the property that is going to be at the side of the road. The argument for the plaintiff is that it is not part of the scheme that has been sanctioned that there should be any building sites at all because the maps show the property existing as it did then, though it is conceded that the maps must mean that there is to be demolition in order to make room for the actual road itself. I think there is no possible construction of the scheme to be discovered on any such lines. It is certainly very unsatisfactory that a formal scheme taking power definitely to do all that may be necessary and carefully complying in this respect with the Local Act by making explicit provision not only of course for every thing that the Trust expects to do but for everything that it wants power to do, has not been put down in a definite and workmanlike document. Research among minutes, resolutions and reports is apt to result in the discovery that quite obvious things have been left in some obscurity. I am very far indeed from suggesting that such a scheme should not be drawn up in terms wide enough to have full discretion to the Trustees to release land, to define, cut up or specify particular building sites, and to decide other important matters. They have too their statutory powers of modifying the scheme. I confine myself to the observation that it is a little extraordinary that there should be any difficulty in ascertaining whether it was part of the scheme to convert a particular property into a new building site—to lay it out or not. Still in the end I find that the scheme is as Mr. Bompas described it, to make a new road with new building sites to reach as far as the edge of the Scheduled property and for that purpose the properties are to be laid out so as to be suitable for such a road. If in the course of those proceedings, a number of special modifications are made, well and good. If the Improvement Trust is induced to abandon their purpose, and modify their scheme with regard to any part, there will be land which will be not required by reason of such modification. That seems to have been done in several cases which the Improvement Trust have had to deal with. So far from being satisfied upon this scheme and upon the evidence that the plaintiff's property is property which is not required for the execution of the

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scheme, I think there is no evidence of that fact whatever, and the result is that as against these defendants this action must fail. These defendants must be dismissed from the action with costs. The action may be continued if it is thought worthwhile against the other defendant between whom and the plaintiff there are other disputes. The motion is also dismissed with costs.

Against this decision, the plaintiff appealed.

Mr. Pugh for the Appellant.

Mr. S. R. Das (with *Mr. Sarcar*) for the Respondents.

The judgments of the Court were as follows :

January, 13.

Mookerjee, J.—This is an appeal by the plaintiff in a suit to test the validity of an order made by the Calcutta Improvement Trust rejecting his application for exemption under section 78 of the Calcutta Improvement Act, 1911. The plaintiff made an application on the 31st August, 1918, on the assumption that the land in dispute was not required for the execution of the scheme within the meaning of sub-section (1) of section 78. Reference was thereupon made to the Land Acquisition Collector and the Deputy Valuer and the proceedings for acquisition were temporarily stayed. The Board, after enquiry, came to the conclusion that the land was required for the execution of the scheme and rejected the application. The plaintiff accordingly instituted this suit, for two-fold relief, namely, *first*, "that the proceedings for the acquisition of the said premises No. 41-3 Jeliatola Street and No. 7-1 Jorapukur lane by or on behalf of the defendants the Trustees may be ordered to be finally stayed and the defendants the Trustees ordered and decreed to conform to and carry out the provisions of section 78 in manner stated in the fifteenth paragraph of the plaint and abandon the proceedings for the acquisition of the said two premises in accordance with the provisions of the said section;" and, *secondly*, for "the declaration that the said resolution of the defendants the trustees in so far as it rejected the plaintiff's said application was and is illegal and *ultra vires* and void and that the same may be ordered to be set aside."

Mr. Justice Rankin has dismissed the suit on the ground that the plaintiff had failed to satisfy him by evidence that the property was not required for the execution of the scheme. The appellant has contended that the burden of proof should not have been thrown upon him and that in view of the proceedings taken by the Board under section 78 it should have been presumed that the land was not required for the execution of the scheme. Our atten-

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tion has also been drawn to section 39 of the Act which sets out the circumstances under which a street scheme may be framed, as also to section 41 which sets out the matters required to be provided for in improvement schemes. Section 39 provides that whenever the Board are of opinion that, for the propose of (a) providing building sites, or (b) remedying defective ventilation or (c) creating new, or improving existing, means of communication and facilities for traffic or (d) affording better facilities for conservancy, it is expedient to lay out new streets or to alter existing streets (including bridges, causeways and culverts), the Board may pass a resolution to that effect and shall then proceed to frame a street scheme for such area as they may think fit. Section 41 provides *inter alia* that every improvement scheme shall provide for (a) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be required for the execution of the scheme; and (b) the laying out or relaying out of the land in the said area. In the case before us, a scheme was prepared by the Board under section 39 and was submitted to the Government for approval. The scheme is not set out in a compact form and it is difficult to determine from the various papers embodying it the precise scope of the scheme; but this much is clear that the scheme was undertaken because the Board were of opinion that for the purposes of providing building-sites, remedying defective ventilation, or creating new, or improving existing means of communication, it was expedient to lay out new streets or to alter existing streets in Ward No. VI and its neighbourhood. The scheme further stated that building-sites should be provided and would be plotted in accordance with public demand and this was supplemented by the observation that generally there would be a ready market for plots of from 6 kattahs to 1 bigha. It has been contended by the Advocate General on behalf of the claimant that the scheme was *ultra vires*, because building-sites were not demarcated on the plans. We are unable to give effect to this contention. We can find nothing in the Act which compels the Trust to delineate on the plan the building-sites before the scheme is submitted to Government for sanction. In this case, when the matter was under investigation by the Board, the Assistant Valuer stated that the disputed property was too small to form an independent building-site on a 100 feet main thoroughfare. He recommended accordingly that the properties should be amalgamated with neighbouring parcels to form a suitable plot. The Board came to the conclusion that this view was correct and that if the application were granted the result would be that

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the holding would not fit in with the layout. The plan placed before us shows that this opinion was reasonable and well-founded. There can thus be no doubt that the Board came to this conclusion *bona fide*, and, Mr. Justice Rankin correctly held that there was no evidence to show that the land was not required for the execution of the scheme, within the meaning of sub-section (1) of section 78. Consequently, there was no basis for the application to the Trustees; nor is there any ground for complaint in this suit, for the fact that they made enquiries under sub-section 2 of section 78 does not disentitle them ultimately to reject the application on the ground that it does not come within sub-section 1 of that section.

The result is that the decree of Mr. Justice Rankin is affirmed and this appeal dismissed with costs.

Fletcher, J.—I agree.

Messrs. Watkins & Co.: Attorneys for the Appellants.

Messrs. Morgan & Co.: Attorneys for the Respondents.

A. T. M. *Appeal dismissed.*

CIVIL MATRIMONIAL JURISDICTION.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge and Sir Ernest Edward Fletcher, Knight, Judge.

CIVIL.
1920.
March, 1.

SINGRAI SANTHAL

v.

PURAIGI SANTHALNI AND ANOTHER.*

Marriage, dissolution of—Indian Divorce Act (IV of 1869), Sec. 14—Marriage, solemnization of—Marriage, date of.

In a divorce case before a final decree is made the Court must come to a distinct finding upon the question whether the marriage was solemnized in India and upon what date, though there is a statement in a verified petition for dissolution of marriage that the parties were married to each other in British India according to the doctrine of Christianity.

*Divorce case No. 1 of 1919 decided by J. Johnston Esq, District Judge of Rungpur, dated the 25th March, 1919.

CIVIL.

1930.

Singrai
v.
Puraigi Santhalni.

For confirmation of order under section 17 of the Indian Divorce Act.

The petitioner, Singrai Santhal brought a suit for the dissolution of his marriage on the ground that his wife Puraigi Santhalni was guilty of adultery and joined the alleged adulteror, Jnana or Gena Santhal as a co-respondent in his petition. A decree for dissolution of his marriage was made. The record was then sent to High Court for confirmation of the order, when the following order was passed by

Sanderson, C. J.—There is no finding in the learned Judge's judgment of the marriage of the parties. There is a statement in the petition that they were married to each other in British India according to the doctrine of Christianity, and it is true that that petition has been verified. But it is the well established practice that the learned Judge should come to a distinct finding upon the question whether the marriage has been solemnized in India and upon what date. Consequently, we send this case back to the learned Judge in order that he may come to a finding upon that point.

We hope that in future learned Judges dealing with these Divorce cases will follow the judgment that has just been given and that it will not be necessary for us to send cases back for this reason in the future.

When the findings came after remand, the following order was passed by

Sanderson, C. J.—This matter was remanded to the learned Judge for a distinct finding upon the question, whether the marriage had been solemnized in India and upon what date. The learned judge has now found that the petitioner and the respondent were married in India according to the rites of the Christian Baptist Church, both being Christians by religion, and that the marriage took place on the 9th of June, 1910. Consequently we confirm the decree.

A. T. M. *Order for dissolution of marriage confirmed.*

CRIMINAL REVISION.

Before Sir Lancelot Sanderson, Knight, Chief Justice and Mr. Justice Walmsley.

CRIMINAL.

1920.

February, 12.

NANDO LAL GUHA

v.

CORPORATION OF CALCUTTA.*

Drainage—Calcutta Municipal Act (III B.C. of 1899), Secs. 299, 575—Proceedings, abandonment of—Delay.

The petitioner was convicted on the 28th of January 1916 for not having complied with the requisition which was served upon him in May 1915, requiring him to do certain things in connection with his premises and relating to the drainage therein; and, he was fined Rs. 2. He did not comply with the requisition and on the 15th of August 1916, a fresh complaint was made against him. The charge was for failing to comply with the requisition under section 299 of the Calcutta Municipal Act requiring him within 60 days to make a house drain emptying into the sewer and to do other matters (after being convicted and fined Rs. 2 on the 28th January, 1916). These proceedings were taken under section 575 of the Act. On the 29th of August, the accused's son appeared and said he was making arrangement for departmental execution of work. The order was—"Two weeks' time allowed. Fix 12th September, 1916." On the 12th September proceedings were stayed for one month at the instance of the prosecution. On the 25th February 1919, an application was made to the Municipal Magistrate for the revival of the proceedings which were stayed in the case pending the disposal of party's application for departmental execution of work. On that the Magistrate made the following order on the 18th September "case revived. Issue summons for 16th October, 1919." On the 20th November, the petitioner was convicted and was sentenced to a daily fine of eight annas for 30 days from the 16th of May, 1916, that is, Rs. 15 in all:

Held, under the special circumstances of the case and the very great delay that occurred, namely, from the 12th of September 1916 till the 25th of February 1919 as nothing was done with regard to the proceedings, the proceedings were abandoned, and the order of the Magistrate convicting the petitioner of offences committed from the 16th of May and 30 days afterwards, was invalid.

Application for revision under section 435 of the Code of Criminal Procedure.

The material facts appear from the judgment.

Babu Manmatha Nath Mukherjee for the Petitioner.

No one appeared for the other side.

The judgments of the Court were as follows:

*Criminal Revision No. 59 of 1920, against the order of Khan Bahadur Abu Nasr Muhammad Ali, 2nd Municipal Magistrate of Calcutta, dated the 20th November, 1919.

CRIMINAL.

1920.

Nando
v.
Corporation of Calcutta.

February, 12.

Sanderson, C. J.—This is a rule calling upon the Chairman of the Corporation and the Municipal Magistrate to show cause why the order complained of should not be set aside or why such other order should not be made in the matter as may seem fit to this Court. The order complained of is dated the 20th of November 1919, and by that order the Municipal Magistrate sentenced the petitioner to a daily fine of eight annas for 30 days from the 16th of May 1916, that is, Rs. 15, in all, under section 575 read with section 299 of the Calcutta Municipal Act, III of 1899.

The facts of this case are to my mind exceptional: and the decision, at which we have arrived depends upon the exceptional facts of this case, and should not be taken as covering any other case in which the facts are different.

It appears that the petitioner was convicted on the 28th of January 1916 for not having complied with the requisition which was served upon him in May 1915, requiring him to do certain things in connection with his premises and relating to the drainage therein: and, he was fined Rs. 2. Apparently he did not even then comply with the requisition and on the 15th of August 1916, a fresh complaint was made against him. The charge was for failing to comply with the requisition under section 299 of the Act requiring him within 60 days to make a house-drain emptying into the sewer and to do other matters "(after being convicted and fined Rs. 2 on the 28th January, 1916)." These proceedings were taken under section 575 of the Act. On the 29th of August, the accused's son appeared and said he was making arrangements for departmental execution of work. The order was—"Two weeks' time allowed. Fix 12th September 1916." Then, on the 12th of September proceedings were stayed for one month at the instance of the prosecution. Apparently, negotiations were then entered upon between the petitioner and the Municipal authorities, the petitioner alleging that he was too poor to carry out the requisition. It is not necessary for me to go into the details of the negotiations, but they seem to have lasted for a very long time. Eventually, they fell through and nothing came of them. Then, on the 25th of February 1919, more than two years after the proceedings had been stayed, an application was made to the Municipal Magistrate;—I will read the application, because, the wording of it to my mind is somewhat unusual:—

"The prosecutor prays that case No. 2580 in which proceedings were stayed in this Court on the 12th of September 1916 may be revived as the accused has not complied with the requisition of notice served. Proceeding was stayed in the case pending the disposal of

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1920.

Nando
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Corporation of Calcutta.

Sinderson, C. J.

the party's application for departmental execution of work; as the application for departmental action has been refused, the present application for revival of proceedings is being made." Upon that application, the Magistrate made this order "case revived. Issue summons for 16th October 1919. Inform Sub-Inspector of the date." On the 18th of September the application was granted and the case was revived. Then on the 20th of November, as I have already stated, the petitioner was convicted and the period for which he was fined was for 30 days commencing from the 16th May, 1916, The Municipal Magistrate stated in his judgment "the period for which the accused has been prosecuted is mentioned as the 29th of January to the 4th of August; but as the complaint was filed on the 15th of August, I cannot take into consideration the days previous to the 16th of May." Presumably he was acting under the provisions of section 631 and he was of opinion that he could not deal with any period more than 3 months prior to the 15th of August 1916.

The Rule that has been obtained has been supported upon the grounds, first, that inasmuch as the proceedings were stayed on the 12th of September 1916 for one month at the instance of the prosecution and as at the expiration of that one month nothing was done by the complainant, and as he did not appear at the expiration of that month, it was the duty of the Magistrate under section 247 of the Criminal Procedure Code to acquit the accused unless the Magistrate thought proper to adjourn the hearing of the case to some other day, The Magistrate did not adjourn the case and the complainant did not appear at the end of the month. It was, further, argued that having regard to the great delay which had occurred from the date when the proceedings were stayed until the application for arrival (namely from the 12th of September 1916 to the 25th of February 1919) it must be assumed that those proceedings were abandoned and that the application for revival on the 25th of February, if it is to be regarded at all as a competent proceeding, must be regarded as a fresh complaint. I prefer to rest my judgment upon the second ground, namely, that having regard to the special circumstances of this case, the very great delay that has occurred, namely, that from the 12th of September 1916 till the 25th February 1919 nothing was done with regard to the proceedings, it must be taken that those proceedings were abandoned: and, consequently I am of opinion that the order of the Municipal Magistrate convicting the petitioner of offences committed from the 16th of May and 30 days afterwards, which conviction was made on the 20th November 1919, was invalid.

CRIMINAL.

1920.

NANDO v. Corporation of Calcutta.

This Rule must, therefore be made absolute.

The fine, if paid, must be refunded.

WALMSLEY, J.—I agree in the order proposed. I should like to add that such reluctance as I may feel in interfering in this case springs from the fact that it was the petitioner who in the first instance caused the proceedings under section 575 to be held in abeyance.

A. T. M. *Rule made absolute.*

Before Sir Asutosh Chaudhuri, Knight, Judge, and Mr. Justice Newbould.

T. R. PRATT

v.

THE EMPEROR.*

CRIMINAL.

1920.

January, 7.

Warrant—Munition Board, dealings with—Issue of general search warrant—Criminal Procedure Code (Act V of 1898), Sec. 96 (3).

Per Chaudhuri, J.: An issue of warrant referring to an enquiry which is "now being made," when there was no enquiry by the Magistrate, is illegal.

An issue of general search warrant referring to all accounts, ledgers, stock books &c., correspondence and documents which may have a bearing on the transactions with the Munition Board, does not come under section 96 clause (3) of the Criminal Procedure Code.

A great weight is to be attached to the statements made in the petition by the officer engaged in the investigation.

Per Newbould, J.: A Magistrate should not issue a search warrant simply because a Police officer asks him to do so.

Application for revision under section 435 of the Criminal Procedure Code.

A search warrant was issued on the petitioner for production of certain documents at premises Nos. 301, 302, 303, Bowbazar Street, Calcutta, in connection with certain complaints under sections 467, 467/109, 161, 409, 379, 379/109 &c.

* Criminal Revision No. 2 of 1920, against the order of D. Swinhoe, Esq., Chief Presidency Magistrate of Calcutta, dated the 21st December, 1919.

CRIMINAL.

1920.

T. R. Pratt
v.
The Emperor.

January, 7.

Mr, Langford James and *Babu Manmatha Nath Mukherjee* for the Petitioner.

The Advocate-General, Sir B. C. Mitter and *Babu Hemendra Nath Mitter* for the Opposite Party.

The judgments of the Court were as follows:

Chaudhuri, J.: We do not think that we can uphold the order which has been passed by the learned Magistrate in this matter. The warrant which has been actually issued refers to an enquiry which is "now being made." It is conceded that no enquiry is being made by the Magistrate and the enquiry which is therein mentioned, probably refers to the investigation which is being made by the officer appointed by the Government to enquire into the dealings with the munition Board. The warrant does not refer to an enquiry 'about to be made." What was prayed for was a general search warrant in respect of books and documents mentioned in the petition namely, for the years 1917, 1918 and 1919. The warrant as issued is a general warrant referring to *all* accounts, ledgers, stock-books, etc., correspondence and documents which may have a bearing on the transactions with the Munition Board. It is said that the order was made under section 96, clause 3 of the Criminal Procedure Code, that is to say, when the Court considers that the purposes of any enquiry, trial or other proceedings under the Code will be served by a general search or inspection, but there is no enquiry or trial or other proceeding under the Code.

Then, as regards the Court "considering" the matter, there is nothing stated in the petition about T. R. Pratt having any business transactions with the Munition Board. It is urged that from the name of that Firm appearing in the Schedule to the petition, it ought to be inferred that there were business transactions between T. R. Pratt and the Munition Board. We do not find that there is any material in the petition which the Magistrate could have considered in connection with the issue of a search warrant so far as T. R. Pratt is concerned. No doubt, great weight is to be attached to the statements made, in the petition, by the officer engaged in the investigation. There is nothing to suggest that he is not doing his very best in the matter and it is not the intention of the investigation officer to cause any damage to the parties named in the petition. In fact the petition has been very carefully worded so far as that is concerned. It seems to us, however, to be an investigation conducted by the officer to find out what offence if any was committed and by whom upon inspection of the books

and other papers if obtainable of firms which had business transaction with the Munition Board. It is not suggested that this is a case, under Chapter 14 of the Criminal Procedure Code, and therefore it is unnecessary for us to deal with it. Reference has been made to the case, *Clarke* v. *Brajendra* (1), but we do not think that the decision in that case affects the question arising in the case before us.

We therefore make the rule absolute and direct that all the books and documents taken from T. R. Pratt be returned to him forthwith.

Newbould, J.:—As I look at the case the rule must be made absolute on the following ground. That there were no materials before the Magistrate on which he could decide that a search warrant should be issued. A long petition was presented stating that certain offences appeared to have been committed. There is nothing in the petition to connect T. R. Pratt with these offences. All that is stated to support the application for a search warrant against him is contained in paragraph 17 of the petition which runs thus:—

"Enquiry is now being made into the offences mentioned above and it is essential for that purpose that the production of the books and accounts for the years 1917, 1918 and 1919 up to date, of the firms stated below should be enforced by a search warrant, as, for obvious reasons, the firms concerned are not likely to produce them otherwise." In other words the Magistrate granted a search warrant simply because the Police officer informed him that it was necessary; when the law requires the sanction of a Magistrate before the issue of a search warrant that means that the Magistrate should apply his mind to the facts and he ought not to issue a search warrant simply because a Police officer asks him to do so. On this ground, I agree with my learned brother that the order passed by the Magistrate is illegal and ought to be set aside.

A. T. M. *Rule made absolute.*

(1) (1912) I. L. R. 39 Calc. 953; 16 C. L. J. 231.

APPELLATE CIVIL.

Before Mr. Justice Walmsley and Sir Syed Shamsul Huda Knight, Judge.

CIVIL. 1919. July, 3, 25.

PROSONNOMOYI GHOSHANI

v.

GOPAL LAL SINHA.*

Interest—Money due for work done—Delay in paying—No writing—No proof of actual loss—Contract Act (IX of 1872), Sec. 73—Interest Act (Act XXXII of 1839), Sec. 1.

A creditor, if not entitled to any interest under the Interest Act, is not debarred from claiming interest by way of damages under section 73 of the Contract Act.

Section 73 of the Contract Act requires the creditor to prove actual loss: *Surja* v. *Pratap* (1) followed.

Interest by way of damages is not recoverable for the mere wrongful detention of an ordinary debt: *Surendra* v. *Kunja* (2) followed.

The plaintiff built a house for the defendant and sued to recover Rs. 606-7 as. for labour and materials and Rs. 188 for interest. There was no written contract and no demand in writing of interest. It was not alleged that the plaintiff sustained actual loss by the detention of money:

Held, that neither under the Contract Act, nor under the Interest Act, the plaintiff was entitled to interest for the money due.

Appeal by Defendant No. 4.

Suit for recovery of money.

The material facts appear from the judgment.

Babus S. K. Sinha and *Gopendra Nath Dass* for the Appellant.

Babu Shivaprasanna Bhattacharyya for the Respondent.

C. A. V.

The judgments of the Court were as follows:

July, 25.

Walmsley, J.—This appeal arises out of a dispute about the cost of erecting a house. The plaintiff built a house for the defendant, and he sued to recover Rs. 606-7-0 for labour and materials and Rs. 188 for interest. The first Court gave him a decree for Rs. 308-14-0 with interest at 6 per centum. Both sides appealed; and the learned District Judge made a slight modification in favour of the plaintiff, but dismissed the defendant's appeal.

* Appeal from Appellate Decree No. 1352 of 1917, against the decree of M. Yusuf, Esq., District Judge of Murshidabad, dated the 27th March, 1917, modifying that of Babu Bishnupada Rai, Munsiff, Additional Court at Kandi, dated the 31st July, 1916.

(1) (1899) I. L. R. 26 Calc. 955 (965). (2) (1900) I. L. R. 27 Calc. 814.

The defendant has preferred this second appeal. Two arguments are put forward on her behalf: one relates to the amount to be deducted from the plaintiff's bill in consideration of the bricks provided by the defendant, and the other is as to the defendant's liability for interest.

So far as the bricks are concerned, the learned Judge's finding as to the number supplied is one which cannot be challenged in this Court.

The argument that the defendant is not liable for interest raises a more substantial question. The learned Munsif allowed interest as the sum was withheld from the plaintiff for a long time. The learned Judge takes the same view: he says that the sum due to the plaintiff was due for work done, and that for the unlawful detention of that money the plaintiff is entitled to interest by way of damages, and in support of this view he quoted the case of *Mathura Prasad* v. *Rukmini Koer* (1).

It is to be observed that no attempt is made to justify the order awarding interest by reference to Act XXXII of 1839. It would, in fact, be impossible to do so, for there is no written instrument, and no demand in writing.

Again neither of the Courts below professes to rely on section 73 of the Contract Act. The learned Vakil who appears for the respondent however argues that that section, especially in the light of illustration (*n*), warrants the order. That argument was answered by the learned Judges who decided the case of *Kamalammal* v. *Peeru Meera Lebbai Rowther* (2). I may also refer to the judgment of Banerjee, J. in the case of *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya* (3), where he pointed out that section 73 of the contract Act requires the creditor to prove actual loss. In the present case it is not alleged that the plaintiff sustained actual loss; *e.g.*, that he had to borrow money to carry on his business while he waited for the defendant to pay him. In my view therefore the order making defendant liable for interest cannot be sustained under the contract Act.

We are thrown back on a third ground, a so-called equitable principle that when a debtor withholds payment of money due the creditor is entitled to interest. The learned Judge does not use the words equitable principle, but they have been used in addresses to the Court in cases where the same argument has been advanced. The principle sounds reasonable, but it runs counter to the general

(1) (1911) 17 C. L. J. 87.
(2) (1897) I. L. R. 20 Mad. 481.
(3) (1899) I. L. R. 26 Calc. 955 (965).

CIVIL
1919.
Prosonnomoyi
v.
Gopal.
Walmsley, J.

rule of English law that interest by way of damages is not recoverable for the mere wrongful detention of an ordinary debt. It was examined in the Madras case already quoted, and it was rejected, and the Calcutta case which the learned District Judge says is distinguishable seems to me very important. In that case the trial Judge said, "There is no express contract to pay interest * * * * however I would allow the plaintiff to recover interest as he has been so long deprived of his use of the money." This Court set aside the order awarding interest, and Maclean, C. J., after holding that the case could not come under Act XXXII, and remarking that the order was not supported by reference to the contract Act, said that it was difficult to see upon what ground interest had been allowed.

It is true that there are several reported cases in which a contrary view appears to have been taken. Among them is the decision of the Privy Council in the case of *Chajmal Das* v. *Brij Bhukan Lal* (1), but that as a case came within the provisions of Act XXXII. Some of the other cases can be distinguished; others, I must admit it would be difficult to distinguish.

I think we ought to follow the decision in *Surendra Kumar Basu's* case (2); and allow the appeal so far as the claim in respect of interest is concerned. As success is divided I would order each party to bear his own costs.

Shams-ul-Huda, J.—The plaintiff in this case is clearly not entitled to any interest under the Interest Act. But that in my opinion, does not debar him from claiming interest by way of damages under section 73 of the Contract Act. In this case, however, the plaintiff did not claim interest by way of damages in the plaint nor does it appear that the question regarding the measure of damages was raised in the issues.

Under these circumstances I agree with my learned brother in holding that the plaintiff is not entitled to any interest before the date of suit.

A. T. M. *Appeal allowed in part.*

(1) (1895) I. L. R. 17 All. 511 P. C.
(2) (1900) I. L. R. 27 Calc. 814.

CIVIL RULE.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.

RATNAMALA DASI

v.

KAMAKSHYA NATH SEN.*

CIVIL.

1919.

August, 19.

Pauper suit—Civil Procedure Code (Act V of 1908), O. 33, Rr. 5, 6, 7, 15—Suit for maintenance by wife—'Cause of action'—'Right to sue'—Maintenance, right to.

Rule 15, order 33 of the Code of Civil Procedure is to be read along with the provisions of rules 5, 6 and 7. Rule 5 contemplates a summary rejection by the Court at the earliest stage of the proceeding. Rule 7 contemplates a refusal of the application to sue as a pauper on the fourth ground mentioned in rule 5, namely, that the allegations of the petitioner do not show a cause of action.

Rule 15, order 33 contemplates the refusal of a second application when it is in respect of the same right to sue; that is, the right to sue which formed the basis of the previous application.

An application for leave to sue in *forma pauperis* by the petitioner, who was the wife of the opposite party, for maintenance from her husband was dismissed on the ground that the allegations in the plaint did not show a cause of action. More than two years afterwards, she made the present application on the 5th August, 1918, for leave to sue in *forma pauperis* to recover maintenance from her husband for a period of more than two years subsequent to the date when the previous application was filed:

Held, that the subsequent application to sue in *forma pauperis* was not barred by rule 15, order 33 of the Code of Civil Procedure.

There is no substantial distinction between 'a right to sue' in rule 15 and 'a cause of action' in rule 5, order 33.

A right to maintenance is a recurring right, accruing from day to day. It may be extinguished or modified by a change of circumstances.

Application for revision by the Petitioner.

Application for leave to sue in *forma pauperis*.

The material facts appear from the judgment.

Babus Manmatha Nath Roy and *Surja Kumar Aich* for the Petitioner.

Babus Brojo Lal Chakrabutty and *Ambicapada Chowdhury* for the Opposite Party.

Babu Ram Charan Mitra for the Government.

The judgment of the Court was delivered by

* Civil Rule No. 330 of 1919, against the order of Babu S. Chakrabarti, Subordinate Judge, 1st Court of 24-Perganas, dated the 8th March, 1919.

CIVIL.

1919.

Ratnamala Dasi
v.
Kamakshya Nath.

August, 19.

Mookerjee, J. We are invited in this rule to consider the legality of an order dismissing an application for leave to sue in *forma pauperis* on the ground that it is barred by Order 33 Rule 15 Civil Procedure Code. The petitioner is the wife of the opposite party. In 1916, she applied for leave to sue in *forma pauperis* to recover maintenance from her husband from April 1916 to the date of the institution of the suit. On that application, notice was issued to the opposite party and the application was refused on the ground mentioned in Rule 5 clause (*d*), namely, that the allegations in the plaint did not show a cause of action. More than two years afterwards, she made the present application on the 5th August 1918 for leave to sue in *forma pauperis* to recover maintenance from her husband from April 1916 to the date of the institution of this suit. The Subordinate Judge has held that the application is barred under Order 33 Rule 15; and, in support of this view, has relied upon the decision in *Ranchod Morar* v. *Bezanji Edulji* (1).

Order 33 Rule 15 is in these terms: An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue. This rule must be read along with the provisions of Rules 5, 6 and 7. Rule 5 authorises the Court ro reject an application for permission to sue as a pauper on one or more of five specified grounds. The fourth of these grounds is that the allegations do not show a cause of action. This rule evidently contemplates a summary rejection by the Court at the earliest stage of the proceedings. Rule 6 next provides that where the Court sees no reason to reject the application on any of the grounds stated in Rule 5, it shall fix a day, of which at least ten days' clear notice shall be given to the opposite party and the Government pleader, for receiving such evidence as the applicant may adduce in proof of his pauperism and for having any evidence which may be adduced in disproof thereof. Rule 7 lays down that on the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses, if any, produced by either party and may examine the applicant or his agent and shall make a memorandum of the substance of their evidence. The Court shall also hear any argument which the parties may desire to offer on the question, whether, on the face of the application and of the evidence, if any, taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in Rule 5. The Court shall then either allow or refuse to allow the applicant to sue as a pauper. It is plain that

(1) (1894) I. L. R. 20 Bom. 86.

Rule 7 contemplates a refusal of the application on the fourth ground mentioned in Rule 5 namely that the allegations of the petitioner do not show a cause of action. This is what happened here in the first instance. The petitioner thereupon moved this Court. This Court rejected the application and made an observation to the following effect: "The applicant may, however apply to sue as a pauper on another plaint which shows a cause of action." This observation was made *ex parte* and does not consequently operate as a binding decision between the parties. But we are not prepared to ignore the observation which was made by Mr. Justice Woodroffe and Mr, Justice Shamsul Huda. We have, however, independently of this observation, arrived at the conclusion that it was open to the petitioner to make a fresh application for leave to sue in *forma pauperis* in the circumstances which have happened in this case. The first plaint was rejected on the ground that the allegations did not show a cause of action. Thereupon the petitioner applied to the Court for leave to sue in *forma pauperis* on the basis of a plaint which, she alleged, disclosed a cause of action. In our opinion, Rule 15 does not bar a second application in such circumstances. That rule contemplates the refusal of a second application when it is in respect of the same right to sue; that is the right to sue which formed the basis of the previous application. Now, admittedly the previous application did not show a cause of action. We are not unmindful that the expression used in Rule 5 is 'cause of action,' whereas the phrase which appears in Rule 15 is 'right to sue.' But, plainly the two rules are intended to cover the same ground, and, for the purposes of this matter, there is no substantial distinction between 'a right to sue' and 'a cause of action,' which refer to the same thing considered from different points of view. There is a further difficulty in the way of the opposite party. The second application is in respect of a suit in which maintenance is claimed for a period of more than two years subsequent to the date when the previous application was filed. Now a right to maintenance is a recurring right, accruing from day to day. It may be extinguished or modified by a change of circumstances. It cannot by any stretch of language be suggested that the claim to maintenance for the period subsequent to the presentation of the previous application is the same right to sue as furnished or would have furnished a cause of action for the previous application. On both these grounds, we hold that the Subordinate Judge should have dealt with the application on the merits and should not have dismissed it as barred under Order 33, Rule 15.

CIVIL.
1919.
Ratnamala v. Kamalakhya Nath.
Mukherjee, J.

The result is that this rule is made absolute, the order of the Subordinate Judge set aside and the case remitted to him in order that he may deal with the case in accordance with law. The petitioner is entitled to her costs of this rule to be realised from the opposite party. We assess the hearing-fee at one gold mohur.

A. T. M. *Rule made absolute.*

APPELLATE CIVIL.

Before Mr. Justice Richardson and Mr. Justice Beachcroft.

CIVIL.
1918.
January, 18.

BASUMATI DEBI
v.
TARITBASANI DASI AND OTHERS.*

Appeal—Order remanding a suit—Civil Procedure Code (Act V of 1908), O. 41, R. 23, O. 43, R. 1 (u)—Order irregularly made—Cause, determination of—Appellate Court, power of—New points, raising of.

An appeal lies against an order remanding a case by the appellate Court, which, in form and substance, is an order under rule 23, order 41 of the Code of Civil Procedure, whether regularly or irregularly made.

The determination of causes depends on the allegations and the proof.

An appellate Court is not entitled to raise new points involving fresh evidence in appeal and to remand the case for the trial of questions which never occurred to the parties previously.

Appeal by the Defendant.

Suit to establish the plaintiff's right of way over certain plots of land belonging to the defendant.

The material facts appear from the judgment.

Mr. S. N. Banerjee and *Babu Tarakeswar Pal Chowdhury* for the Appellant.

Dr. Jadu Nath Kanjilal for the Respondents.

The judgments of the Court were as follows :

January, 18.

Richardson, J.—This is an appeal from an order of the Subordinate Judge of Hooghly, dated the 10th March, 1916. The order is an order of remand made in a suit brought by the plaintiff to establish her right of way over certain plots of land belonging to the

* Appeal from Appellate Order No. 107 of 1916, against an order of the Subordinate Judge of Hooghly, dated the 10th March, 1916, reversing that of the Munsiff of Hooghly, dated the 22nd December, 1913.

defendant Srimati Basumati Debi, the appellant before us. In the trial case the suit was treated by the learned Munsif and by the parties as a suit to establish an easement over the land in the nature of a right of way acquired by prescription under the provision of section 26 of the Indian Limitation Act or in the nature of a right of way of necessity. In the Trial Court the plaintiff failed and the suit was dismissed. When the case came before the Court below, the learned Subordinate Judge concurred with the Munsif in holding that on the evidence on the record the plaintiff had failed to prove that she was entitled to a right of way either on the basis of prescription or on the basis of necessity. Looking at the pleadings and the issues I should have thought that when he came to that conclusion, the learned Subordinate Judge would have at once dismissed the appeal and confirmed the decree of the Munsif. Instead of doing this, however, he went on to discuss other questions which do not appear to have occurred to the parties or their legal advisers or to the Court at the trial. He suggested that even if there was no easement made out under the provisions of section 26 or even if the claim in so far as it was dependent on that section was barred by limitation, not having been brought within two years of the time when the right of way was obstructed, nevertheless the plaintiff might have some title founded either on custom or grant or some right to use this way as village road or even as a public road. If the plaint be read as a whole with reference to the statement of facts to be found there, it is quite clear that the plaintiff based her case either on section 26 or on necessity and on no other ground. The Subordinate Judge refers to paragraph 7 of the plaint, which asserts generally that the plaintiff has acquired an indefeasible right of user to pass and re-pass over the plots in dispute and that no one has a right to prevent her by putting up fences or in any other manner. That assertion, however, is merely a summary of the claim as it is put forward in the preceding paragraphs of the plaint. It is quite clear, as I have said, from the preceding paragraphs that the plaintiff's claim is founded either on prescription under the act or on necessity. The learned Judge further refers to issue No. 5 as that issue was framed by the Munsif. The issue runs as follows:—

"Has the plaintiff a right of easement of way or of necessity over the disputed land." It may be that reading the issue apart from the pleadings and apart from the allegations of facts on which the plaintiff founded her claim, it would be wide enough to cover questions of grant or custom or dedication. But it is an elementary rule that the determination of causes depends on the allegations and the

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1918.

Basumati Debi
v.
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Richardson, J.

proof. In one part of his judgment dealing with issue No. 5, the learned Munsif says: "On the whole, the plaintiff's witnesses speak about the public user of the pathway which is not the plaintiff's case." It is plain that the path was not claimed by the plaintiff as a village path or as a public path and the learned Subordinate Judge was not entitled to raise new points involving fresh evidence in appeal and to remand the case for the trial of questions which had never occurred to the parties previously.

It has been suggested by the learned Pleader who has appeared for the respondent that this order of remand made by the learned Subordinate Judge was not an order under rule 23 of Order XLI from which an appeal would lie, but under rule 25 of the same Order from which no appeal would lie. In form, however, the order is an order under rule 23. The suit has been remitted to the Trial Court to be re-heard not only on the evidence already recorded but on such further evidence as the parties may desire to adduce. It may be that regard being had to the terms of rule 23, this is not a case in which it was, strictly speaking, open to the learned Subordinate Judge to make an order under that rule. But whether the order was regularly made or irregularly made it appears to me to be in form and substance an order under that rule. That being so the order must be treated as an order under rule 23, from which an appeal lies. On this point I am unable to accept the contention of the learned Pleader for the respondent.

The result is that in my opinion, the order of remand must be set aside and the suit remitted to the Court of the Subordinate Judge in order that the appeal to that Court may be finally disposed of with reference to the observation I have made. In setting aside that part of the judgment of the Subordinate Judge which remands the suit we leave untouched his findings on the rest of the case. It may, therefore, be unnecessary in that court to do more than to make a decree but, as I have said, it will be for the Subordinate Judge to dispose of the appeal. The appellant is entitled to the costs of this appeal. We assess the hearing-fee at three gold mohurs.

Beachcroft, J.—I agree.

A. T. M. *Appeal allowed: Case remanded.*

Before Mr. Justice Walmsley and Sir Syed Shamsul Huda, Knight, Judge.

MOHENDRA NATH CHAKRAVARTI

v.

RAMTARAN BANDOPADHYA AND ANOTHER.*

CIVIL.
1919.
June, 17.

Appeal—Order remanding a suit—Civil Procedure Code (Act V of 1908), O. 43r. R. 1 (u).

No appeal lies against an order passed by an appellate Court remanding a case otherwise than under order 41 rule 23 of the Code of Civil Procedure.

Appeal by the Plaintiff.

Suit for possession.

June, 17.

The material facts will appear from the following extracts from the judgment of the lower Appellate Court :—

"This appeal arises out of an unfortunate litigation started in September, 1910, and the end is still far from sight. The plaintiff and the Defendant No. 1 each purchased a moiety of premises No. 15, Mullick Lane, by two separate *kobalas*, within about a month of each other, from a third party. The plaintiff agreed to take the northern half, with a passage opening out to the Mullick Lane, and the defendant No. 1 agreed to take the southern half abutting on the said lane. The contending parties are in possession of their respective portions, and the plaintiff's complaint is that the defendant No. 1 has encroached upon a piece of land appertaining to the plaintiff's portion, measuring 7 chattacks 22 square feet as alleged in the plaint. The plaintiff also claims some title deeds. The defendant No. 1 contends that the disputed land appertains to his own portion and that the necessary title deeds have already been delivered, and that the suit is not maintainable as framed.

"The suit was partly decreed in the lower Court on 22nd December, 1911, on the basis of a local enquiry by a Commissioner. An appeal and a cross-appeal were filed and the Appellate Court remanded the suit for new trial after a fresh local enquiry, by its order, dated 28th February, 1913. The Munsiff tried the suit afresh, but found that the result of the fresh local enquiry was wrong. The lower Court struck out a boundary line of its own, on grounds which seem to me to be arbitrary, and holding that the boundaries of the entire premises are as stated in the judgment, partly decreed the suit on the 16th December, 1915. The plaintiff has preferred this appeal, and the defendant No. 1 has filed cross-objection.

* Appeal from Order No. 46 of 1918.

CIVIL.

1919.

Mohendra v. Ramratan.

"This appeal was first heard on 3rd May, 1917. It seemed to me desirable to rectify the errors of the previous Commissioner, and hence I appointed Babu Banamali Chatterji, pleader, to hold a fresh local enquiry, and I kept the appeal pending in my file Babu Banamali Chatterji has submitted his report with a map."

After considering this report, the Sub-ordinate Judge came to the conclusion that the enquiry held by Babu Banamali Chatterji was not satisfactory. He concluded his judgment as follows :—

"The matter is a very trifling one, and the litigation is being prolonged on account of the very strained feelings between the parties. They do not choose to settle the matter amicably, nor to go to arbitration. They want a judicial decision, and this can only be passed on sure grounds. Hence, although it is much to be regretted, another remand is necessary for a proper and fair judicial decision.

"The owner of the land to the west should be examined in order to fix the western boundary. Some authorised servant of the Calcutta Corporation should also be examined to point out the boundary of the Mullik Lane. The previous fence on the north erected by Babu Priya Nath Mullick should be located, and for this purpose the said gentleman should be further examined if necessary or his accredited servant. The vendor of both the contending parties should also be examined. An explanation should be taken from the plaintiff as to why the area of the disputed land as shown by him to the present Commissioner does not agree with the plaint. A fresh local enquiry should be held this time by an Engineer Commissioner. It would be desirable that the above and other witnesses regarding boundaries should be examined before the Commissioner.

"I therefore direct that the suit be retried in the light of the foregoing remarks. The plaintiff has hitherto deposited in the first instance the Commissioners' fee in all the enquiries, except as to a part of the present Commissioner's costs. For the sake of fairness, I would direct that the Defendant No. 1 shall deposit the costs of the fresh local enquiry after remand, which shall however be costs in the suit, and in justice to him I further direct that in supersession of the order of 11th July 1917, passed by this Court, the amount paid by the Defendant No. 1 for supplementary enquiry be also considered to be costs in the suit. The lower court shall decide as to which party should primarily deposit the costs of summoning the additional witnesses. Both parties shall be at liberty to adduce further evidence. The Commissioner shall relay any or all the maps used in evidence and filed by the parties, as he may think necessary, but

he shall not take into account the maps prepared by the Commissioners before in the course of their local enquiries.

"It is, therefore, ordered that the appeal and cross-appeal be both allowed, and the decree of the lower court, so far as it relates to the disputed strip, be set aside. The suit is remanded for fresh trial in the light of the foregoing remarks. The costs of this appeal shall abide the result. The portion of the decree regarding the documents be affirmed. The retrial in the lower court shall be expedited as far as possible. The court-fees on the appeal and cross-appeal shall be refunded."

Against this judgment the present appeal was preferred.

Dr. Jadu Nath Kanjilal and *Babu Amarendranath Bose* for the Appellant.

Babus Baranashibasi Mookerjee, Surendranath Ghosal and *Krishnalal Banerjee* for the Respondents.

The Judgments of the Court were as follows :

Walmsley, J.—A preliminary objection is taken in this case that no appeal lies. The order complained of is an order remanding the case to the first Court. Apparently the order is not made under Or. XLI, R. 23, C. P. C., and it is only against an order of remand under that Rule that an appeal is allowed by the Code. I think the objection must be sustained and the appeal dismissed with costs; hearing-fee, one gold mohur.

The cross-objection is not pressed and is dismissed with costs.

Let the record be sent down at once to the lower appellate Court.

Shamsul Huda, J.—I agree.

A. T. M. *Appeal dismissed.*

CIVIL.
1920.
February, 4.

Before Sir Nalini Ranjan Chatterjea, Knight, Judge and Mr Justice Panton.

PRASANNA CHANDRA CHATTOPADHYA AND OTHERS.

v.

BAIDYA NATH MISTRY AND OTHERS.*

Appeal—Order remanding a suit—Order purporting to be made under O. 41 R. 23 of the Code of Civil Procedure (Act V of 1908)—Order irregularly made.

An appeal lies against an order of remand by an appellate Court under Order 41, rule 23 of the Code of Civil Procedure, although the order ought not to have been made under that rule : *Basumati* v. *Taribasini* (1) followed.

Appeals by the Defendants.

Suits for declaration of title to, and recovery of possession of, two parcels of land.

The material facts appear from the judgment.

Babus Joges Chunder Roy and *Suris Chandra Talukdar* for the Appellants.

Babus Samatul Chandra Dutt and *Biraj Mohan Mojumdar* for the Respondents.

The judgment of the Court was as follows :

February, 4.

These appeals arise out of two suits for declaration of title to, and recovery of possession of, two parcels of land.

With regard to one of these parcels, the record-of-rights is in favour of the appellants, and with regard to the other it is against them. With regard to the former, the respondents brought a suit against the appellants. The latter brought another suit against the respondent in respect of the other piece of land. The land claimed by the appellant lies just to the east of the land for which the respondent brought his suit. The appellant claims the land in his suit as part of Jamberdwip : while the respondent claims the land as part of Khoyerkati.

A Commissioner was appointed to make a local investigation and he submitted his report. The learned Munsif on a consideration of the report and other evidence adduced by the parties gave a decree to the appellant in respect of the greater portion of the land claimed.

* Appeals from orders Nos. 332 and 333 of 1916, against the orders of Babu Achinta Nath Mitter, 2nd Subordinate Judge of Barisal, dated the 23rd May, 1916, reversing those of Babu Surjya Kanta Sen, 3rd Munsiff of Perojpur, dated the 20th April, 1914.

(1) (1918) 31 C L J. 354.

by him as plaintiff and dismissed the suit of the respondent entirely. The respondent therefore appealed to the lower appellate Court and the learned subordinate Judge being of opinion that the trijunction point had not been correctly placed and that it was not safe to accept the boundary line obtained by measuring from a certain point mentioned in his judgment and further that a better result was likely to be obtained if the measurement was made from the *chitka chita*, remanded the cases to the Court of first instance for ascertaining the boundary with directions to re-admit the suits and determine them after getting a local investigation made according to the directions given in his judgment and allowing the parties to adduce any additional evidence if they wished to do so. Against that order of remand, the present appeals have been preferred.

A preliminary objection has been taken to the hearing of the Appeals on the ground that as the Court of first instance did not decide the cases on a preliminary point, the order of the lower appellate Court did not come within Order 41 rule 23 of the Code and that therefore no appeal lies against the order, as the only appeal provided by the Code is under Order 43 rule 1(n) against an order under Order 41 rule 23.

We have been referred to the case of *Mohendra Nath Chuckervarti* v. *Ram Taran Bandopadhya* (1), in which the learned Judges held that no appeal lies against an order passed by an appellate Court remanding a case otherwise than under Order 41 rule 23 C. P. C. But the question is whether an appeal does not lie in cases where the order purports to be an order under Order 41, rule 23, although the order ought not to have been made under that rule. On that question we have been referred by the learned pleader for the appellant to an unreported decision in S. A. No. 107 of 1916 decided on the 18th January 1918 [*Basumati* v. *Tarit Basani* (2)]. In that case Richardson and Beachcroft JJ, observed "whether the order was regularly or irregularly made, it appears to be in form and substance an order under that rule. That being so, the Order must be treated as an order under rule 23 from which an appeal lies": and the learned Judges overruled the preliminary objection that no appeal lay against the order.

We think that in the present case the order made by the lower appellate Court purported to be, and was in form and substance an order under Order 41 rule 23 although we think that the Court

(1) (1919) 23 C. W. N. 1049; 31 C. L. J. 357.
(2) (1918) Since reported, 31 C. L. J. 354; 44 I. C. 416.

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v.
Baidya Nath.

ought not to have remanded the case under the provisions of that rule. The preliminary objection must accordingly be over-ruled.

The cases not having been decided on a preliminary point, the Court of appeal below ought to have decided the appeals itself. No doubt if that Court considered it necessary that there should be a local investigation by the Commissioner or that any additional evidence should have been taken to enable it to pronounce judgment, it might have directed a further investigation or taken additional evidence. In the present case, however, it appears from the judgment of the munsiff that the parties did not want any further investigation or to produce any further material. The learned munsif says: "I was once tempted to pass orders for a fresh investigation although neither party made any the faintest suggestion to that effect. On a most anxious consideration of the evidentiary materials placed before me and the facts and circumstances of these cases, I am disposed to think that any further local investigation will result in nothing but an infructuous expenditure of time and a protraction of these contentious litigations to the immense harassment and pecuniary loss of the parties. The parties in these cases appreciate this position and are anxious for a judicial settlement of their prolonged dispute and resist the suggestion of any further local investigation which would indeed be an unwelcome infliction upon both parties without in any wise ensuring chance of furthering the ends of justice, for the materials at the command of the Civil Court Commissioner that was deputed to make the local investigation are for all practical purposes exhaustive and neither party has in contemplation any additional materials that might with advantage be supplied to the commissioner. Neither party calls into question the integrity of the Commissioner or offers to put his report to the test of a cross-examination."

These remarks would seem to be conclusive, but if the lower appellate Court thinks that the investigation is wrong and that there should be a further investigation, in order to enable it to pronounce judgment we think that it may direct such investigation.

Our attention has been drawn on behalf of the appellant to the fact that the Court of first instance upon a consideration of the evidence as to possession came to the conclusion that the appellant had proved his title by adverse possession for 12 years and that the respondent had failed to prove possession within 12 years in the suit in which he was the plaintiff, and that the learned Subordinate Judge has not touched this question at all, and it is contended that had this question been gone into by the lower appellate Court and

decided in favour of the appellant, there would have been no necessity for remanding the cases for further investigation.

It is true that the Subordinate Judge has not touched this question but he might have thought that a decision on the question of boundary was necessary for determining the question of possession and limitation. He has however, not said so in his judgment.

In all these circumstances, we think that the order of the Court below should be set aside and the cases remanded to that Court for a decision of the appeals before it. If that Court considers that it cannot decide the cases without a local investigation or that the question of limitation and of title cannot be decided without such investigation, then a Commissioner may be appointed for the purpose. The Court may also take additional evidence if it considers it necessary in order to enable it to pronounce judgment but in either case it must be done by the appellate Court itself, or by directing the Court of first instance to have the investigation made, and to take additional evidence retaining the appeals on its own file.

Costs will abide the result.

A. T. M. *Appeal decreed; Case remanded.*

CIVIL RULE.

Before Mr. Justice Beachcroft.

SIB KUMARI DEBI

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Procedure—Witness failing to appear—Civil Procedure Code (Act V of 1908), O. 16, Rr. 11, 12—Fine, when can be imposed.

Rule 11 of order 16 of the Code of Civil Procedure provides for a case where the person satisfies the Court that he has not intentionally failed to carry out the order: Rule 12 applies to the alternative case of a person failing to satisfy the Court whether he appears in order to offer an explanation or not. But in either case whether the facts are those contemplated in rule 11 or rule 12 the Court can only proceed after attachment of the property.

*Civil Rule No. 548 of 1919, against an order of J. N. Pringle Esq., Settlement officer, dated the 31st July, 1919, affirming that of Moulvi Sheikh Abdulla, Assistant Settlement officer.

CIVIL.

1920.

Sib Kumari Debi
v.
Secretary of State for India in Council.

Application for revision under section 115 of the Code of Civil Procedure.

A summons was served on the petitioner asking for certain information regarding a Touzi in which she owns an eight anna share. As she failed to appear she was fined rupees 50 under O. 16, rule 12 of the Code of Civil Procedure.

The material facts appear from the judgment.

Babu Amulya Kumar Bhattacharjee for the Petitioner.

Babu Ram Charan Mitter for the Opposite Party.

The following judgment was delivered by

February, 13.

Beacheroft, J.—This Rule is directed against an order by which the Assistant Settlement officer imposed a fine of 50 rupees on the petitioner and an order on appeal by the Settlement officer affirming that order. The Assistant Settlement officer purported to act under Order XVI rule 12 Civil Procedure Code.

It appears that a summons was served on the petitioner asking for certain information regarding a Touzi in which she owns an eight annas share. The summons was served on the 28th May on an employee of the petitioner. The petitioner states that on the 29th May she sent an officer to the Assistant Settlement officer, but he was told to go away on the ground that that was not the day for hearing the matter. In fact the 30th was the date fixed. Then a notice was issued on the petitioner to show cause why she should not be fined for not carrying out the order. The petitioner's officer showed cause, but he did so on paper which did not bear a court-fee. On the 10th June the order complained of was made by the Assistant Settlement officer.

The objection taken against the order is that the procedure laid down in rules 10, 11 and 12 of Order XVI Civil Procedure Code had not been carried out. Rule 10 provides in the first clause for issue of summons to give evidence or produce documents. The second clause of that rule provides that where a person summoned has failed to attend the Court may issue proclamation requiring him to attend. The third clause of rule 10 provides that instead of issuing proclamation or at the time of issuing proclamation or at any time afterwards the Court may issue a warrant for arrest of the person and make an order for attachment of his property. Then rule 11 provides that after the attachment of the property if the person appears and satisfies the Court that he did not without lawful excuse fail to comply with the summons or intentionally avoided the service, and when he has failed to attend at the time and place

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Beachcroft, J.

named in the proclamation that he had no notice of the proclamation, the Court shall direct that the property be released: Rule 12 provides that the Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him a fine.

In support of the Assistant Settlement officer's order it is now argued by the learned Government pleader that rule 12 must be read independently of rule 11 and that in fact it must be read immediately after the first clause of rule 10 that is, that when a person has been summoned, if he fails to appear in answer to summons then the Court may proceed under Rule 12. It seems to me that that contention cannot be upheld. Rule 12 provides two alternatives, that is, non appearance of the person or his appearing and failing to satisfy the Court. That seems to me to be the alternative of the facts which are contemplated in Rule 11 namely the person appearing and satisfying the Court. To put it in other words Rule 11 provides for a case where the person satisfies the Court that he has not intentionally failed to carry out the order: Rule 12 applies to the alternative case of a person failing to satisfy the Court whether he appears in order to offer an explanation or not. But in either case whether the facts are those contemplated in Rule 11 or Rule 12 the Court can only proceed after attachment of the property. In the present instance there has been no attachment of property and the Assistant Settlement officer's order was without jurisdiction and must be set aside. The fine if paid must be refunded to the petitioner.

I make no order as to costs.

A. T. M. *Rule made absolute.*

APPELLATE CIVIL.

Before Sir Nalini Ranjan Chatterjea, Knight, Judge, and Mr. Justice Panton.

MRS. WINIFRED McQUILLAN

v.

MRS. WINIFRED CHAPMAN.*

CIVIL.
1920.
January 19, 20. February, 9.

Guardianship—Mother leading an irregular life—Guardian appointed, income of—Guardian, appointment of, considerations for—Mother, if permanently forfeits her right to the custody of child.

* Appeal from Order No. 309 of 1918, against an order of A. J. Chotzner, Esq., District Judge of 24-Perganas, dated the 31st August, 1918.

CIVIL.

1920.

Mrs. Winifred McQuillan
v.
Mrs. Winifred Chapman.

Guardianship of a minor child is given temporarily to grandmother instead of to mother, who was leading a very irregular life at the time of the institution of the proceeding and her conduct was such that it would be wrong to confide a child to her.

The mere fact that the mother is unable to earn more than a small and possibly precarious income is in itself no reason for depriving her of the child.

The fact that the grandmother is able to keep the child in very suitable physical surroundings, has weight in the consideration of the question whether she should be appointed guardian.

The mother by such appointment, does not permanently forfeit all her natural right to the custody of her child.

Appeal by the Petitioner.

Application for guardianship of a minor child.

The material facts appear from the judgment.

Mr. R. C. Banerjee, Babus Dhirendra Krishna Ray and *Ramendra Mohan Majumdar* for the Appellant.

Messrs. S. K. Sen, Langford James and *Babus Sarat Chandra Mukherjee, Rishindra Nath Sarkar* and *Krishna Lal Banerjee* for the Respondent.

C. A. V.

The judgment of the Court was as follows :

February, 9.

The parties to this appeal are mother and daughter. Each applied to the District Judge to be appointed guardian of the child of the younger woman, a girl born on the 25th December 1918. The petitioners were heard together with the result that the learned Judge came to the conclusion that the child's mother, Mrs. Mc. Quillan had been behaving in a manner in which no respectable married woman should, and that the interests of the child would be best protected by her being placed under the guardianshi p of Mrs. Chapman, her grandmother. The latter person has accordingly been appointed guardian and against this order Mrs. Mc. Quillan prefers the present appeal.

The learned Judge rightly observes that the case is an exceedingly painful one and deplores the fact that that such a case should have come before a Court of Justice. At the suggestion of the learned Counsel for the parties we have ourselves endeavoured to induce the parties to come to terms. Our efforts have produced no useful result. We must therefore consider whether on the evidence the learned Judge of the Court below has come to a right conclusion and whether the case is one in which the interests of the child require that the mother should be deprived of its custody.

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Mrs. Winifred McQuillan v. Mrs. Winifred Chapman.

It has been strongly urged by learned Counsel for the Appellant that in these proceedings Mrs. Chapman has been actuated more by hatred of her daughter than by a desire for the welfare of the child. It is true that there is a good deal of bitterness in Mrs. Chapman's attack, there is indeed bitterness on both sides. But we are satisfied that she is really anxious for the good of the child, who has lived in her house from early infancy.

The evidence, oral and documentary has been discussed before us at length. We do not propose to enter its sordid details. It is enough to say that we are satisfied on it that the learned Judge of the Court below has justly appreciated the conduct of the Appellant. This evidence clearly shows that shortly before the case was tried she had been leading a very irregular life and that her conduct was such that it would be wrong to confide a child to her care.

It has been urged that the learned Judge has been unduly influenced by the fact that Mrs. Chapman is in more comfortable circumstances than her daughter and so able to give the child a pleasant home. We quite agree that the mere fact that the mother is unable to earn more than a small and possibly precarious income is in itself no reason for depriving her of her child. But the fact that Mrs. Chapman is able to keep the child in very suitable physical surroundings has weight in the consideration of the question whether she should be appointed guardian. In our opinion the learned Judge has not attached undue weight to this fact.

On a consideration of the whole evidence, we are of opinion that it is for the welfare of the child that it should, for the present, remain in the custody of its grandmother, Mrs. Chapman, even though her union with Mr. Chapman is irregular. We do not, however, say that Mrs. McQuillan has permanently forfeited all her natural right to the custody and society of her own daughter. We are informed that her husband, who is now a sergeant in the British Army at present serving in Mesopotomia, is likely to return in the near future. There is evidence that he wishes that his wife should have the child, who was born during their wedlock, should sergeant McQuillan and his wife lead a regular life together, a thing which it appears they have not hitherto done, the situation would be changed and it would be for the District Judge on application to this end being made to him, to consider whether the changed circumstances would justify him in restoring the child to its parents. A similar situation would arise if in course of time Mrs. McQuillan were ina position to satisfy the District Judge that she had otherwise permanently adopted a regular course of

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life. We note in this respect that it has been mentioned to us that she has recently taken up respectable work outside Calcutta.

We affirm the order of the Court below with this modification, namely, that reasonable opportunity be given to Mrs. McQuillan to see her child in Calcutta, from time to time. We have it in the first instance to the good sense of the parties and their friends to arrange how this is to be effected. If this method fails it will be open to Appellant to apply to the District Judge of Alipur who will in that event give directions on the point.

In the circumstances we make no order as to costs.

A. T. M. *Appeal dismissed: Order modified.*

CRIMINAL REVISION.

Before Sir Asutosh Chaudhuri, Knight, Judge, and Mr. Justice Newbould.

CRIMINAL.

1920.

January, 13.

SIV NARAYAN MUKHERJI AND OTHERS

v.

SATISH CHANDRA GHOSAL AND OTHERS.*

Jurisdiction—Criminal Procedure Code (Act V of 1898), Sec. 145—Magistrate, duty of—Likelihood of immediate breach of peace—Forcible dispossession.

The basis of jurisdiction in a case under section 145 of the Code of Criminal Procedure is the likelihood of a breach of the peace.

A Magistrate cannot proceed under section 145 of the Code of Criminal Procedure when there is no likelihood of any immediate breach of the peace nor the occurrence of any disturbance.

A Magistrate is bound to satisfy himself, on grounds which are reasonable, that a breach of the peace is imminent in regard to a property of the description specified in section 145 of the Code of Criminal Procedure, that a dispute likely to cause a breach of the peace exists concerning them, and that the grounds stated by him must be such as would satisfy a Court of revision, before which such a case may be brought by any of the parties concerned: *Queen-Empress* v. *Gobind* (1) followed.

A Magistrate's finding that the second party was forcibly dispossessed by the first party within two months before the institution of the proceeding, is not in accordance with law; but the High Court cannot interfere on this ground, as it is not a question of jurisdiction.

Application for revision under section 435 of the Criminal Procedure Code, by the First Party.

Proceeding under section 145 of the Criminal Procedure Code.

The material facts appear from the judgment.

Babus Dasarathi Sanyal, Manmatha Nath Mukherjee and *Narendra Nath Set* for the Petitioners.

Babus Atulya Charan Bose and *Probodh Chandra Chatterjee* for the Opposite Party.

The judgment of the Court was as follows:

January, 13.

The basis of jurisdiction in cases of this character is the likelihood of a breach of the peace. There was a petition before the magistrate and there was a Police report. He heard both the

*Criminal Revision No. 1022 of 1919, against the order of N. K. Ray, Esq., Deputy Magistrate of Hooghly, dated the 20th September, 1919.

(1) (1893) I. L. R. 20 Calc. 520 (525).

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1920.

Siv Narayan v. Satish Chandra.

parties and he said this: "It appears to me that there is hardly any likelihood of any immediate breach of the peace. A hut was being constructed some time back, as the Police report says and the opposite party was getting together people to demolish the hut. This happened over a month back and no disturbance has occurred yet and in my opinion is hardly likely to occur." He is not merely referring to any immediate breach of the peace; but he says that he does not think that any disturbance is likely to occur. If that was so, how could he proceed under section 145 of the Criminal Procedure Code. It was pointed out in the case of the *Queen-Empress* v. *Gobind Chandra Das* (1), that "a magistrate is bound to satisfy himself, on grounds which are reasonable, that a breach of the peace is imminent in regard to a property of the description specified in section 145, that a dispute likely to cause a breach of the peace exists concerning them, and that the grounds stated by him must be such as would satisfy a Court of revision, before which such a case may be brought by any of the parties concerned."

Upon that observation alone we ought to make the Rule absolute.

It has also been pointed out to us that the proceedings as drawn up do not clearly specify the subject matter of dispute. It undoubtedly refers to 300 bighas of land of which the boundaries are given. But the magistrate proceeds to say that "the 300 bighas are in mouzah Jatrasidhi or Nutun chur which is said to be a part and parcel of Touji No. 47 Purganah Arsha." But the dispute was whether that plot of land belonged to mouza Jatrasidhi or Refaitpore as a putti of Raghunathpur. This also is a serious defect.

There is this further point that after taking evidence, the magistrate held, that the second party had been forcibly dispossessed by the first party within two months before the institution of the proceedings." He overlooks the provisions of section 145. It states clearly that what has to be found is "forcible and wrongful dispossession."

This has been urged as an additional ground upon which the Rule ought to be made absolute. We make this Rule absolute, although the last ground above mentioned, may not be treated as a question of jurisdiction authorising this Court to interfere in this matter.

A. T. M. *Rule made absolute.*

(1) (1893) I. L. R. 20 Calc. 520 (525).

Before Sir Lancelot Sanderson, Knight, Chief Justice and Mr. Justice Walmsley.

SRIMATI DASYA AND ANOTHER

v.

NIBARAN CHANDRA GHOSE.*

CRIMINAL.

1920.

February, 26.

Jurors, report of—Absence of some of the jurors at the time of investigation—Report, if legal—Report, if can be acted upon—Magistrate, duty of.

A report of the jurors under section 133 of the Criminal Procedure Code, is defective when any four out of five jurors were present at the time of the investigation. Such a report is illegal and not to be relied on. The Magistrate should allow the proceedings to go on with a fresh jury.

Application for revision under section 435 of the Criminal Procedure Code.

Case under section 133 of the Criminal Procedure Code. The Magistrate directed the issue of an order according to the decision of the jurors.

Babus Khitish Chandra Chuckerbutty and *Panchanan Ghoshal* for the Petitioner.

Babus Debendra Nath Bagchi and *Mohini Mohan Bhattacharjee* for the Opposite Party.

The judgment of the Court was delivered by.

February, 26.

Sanderson, C. J.—In this case, we make this Rule absolute. The Rule was granted on the second ground that the report of the jurors was defective as only four out of the five jurors were present at the time of the investigation and so the report was illegal and it ought not to have been relied on. It appears that the Magistrate acted upon the report. In our judgment he should not have done so. He should have appointed a fresh jury and allowed the proceedings to go on with the fresh jury.

The Rule is made absolute. The Magistrate must appoint a fresh jury.

A. T. M. *Rule made absolute.*

* Criminal Revision No. 18 of 1920, against an order of the District Magistrate of Pabna, dated the 14th November, 1919, affirming that of the Deputy Magistrate of Pabna, dated the 24th September, 1919.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.

CIVIL. 1919. July, 22.

BIJOY LAL SEAL

v.

NAYAN MONJORI DASI AND OTHERS.*

Declaratory suit—Surplus sale proceeds—Revenue Sale Law (Act XI of 1859), Sec. 31—Unrecorded assignee of recorded proprietor claiming on his own behalf—Representative—Title of unrecorded proprietor—Civil Court, jurisdiction of.

Under section 31 of the Revenue Sale Law, an unrecorded assignee of a recorded proprietor is not his representative; so a Collector is justified in refusing to pay to such assignee, claiming on his own behalf, the money held in deposit as surplus sale proceeds of a sale held under the Revenue Sale Law, on account of the recorded proprietor: *Secretary of State* v. *Marjum* (1) followed.

The title of the unrecorded proprietor is not lost by such sale; he is entitled to receive the surplus sale proceeds, if he can establish in the civil Court, as against the recorded proprietor, that he is entitled to the estate at the time of the sale. He is then entitled to apply to the Collector on the basis of the civil Court decree.

Appeal by the Plaintiffs.

Suit for declaration of title to surplus sale proceeds of a sale held under the Revenue Sale Law.

The material facts appear from the judgment.

Babu Pares Nath Mukherjee for the Appellants.

Babus Abinas Chandra Ghose, Dwijendra Nath Mukherjee and *Khitis Chunder Chakrabutty* for the Respondents.

The judgment of the Court was delivered by

July, 22. Mookerjee, J. This is an appeal by the plaintiffs in a suit for declaration of title to the surplus sale proceeds of a sale held under the Revenue Sale Law 1859. The case for the plaintiffs is that holding No. 130, Division 1, Sub-Division 17, within the jurisdiction of the Collector of 24 Perganahs, was sold for arrears of revenue on the 16th March, 1903, for Rs. 11,100 and that after satisfaction of the dues of the Government, Rs. 11,050 approximately is in deposit in the collectorate. The exact sum, as appears from the written statement of the Secretary of State who was originally made

* Appeal from Original Decree No. 114 of 1918, against the decree of Babu Amulya Chundra Ghose, Subordinate Judge of 24 Purganas, dated the 13th October, 1917.

(1) (1885) I. L. R. 11 Calc. 359.

a respondent, is Rs. 11,085-7-6. At the time of the sale, the registered proprietors were members of the Paikpara Raj family of Singhs, Giris Chandra, Purna Chandra, Kanti Chandra, Indra Chandra and Sarat Chandra. The plaintiffs assert that although the Singhs were registered proprietors, they had no subsisting interest in the holding on the date of default or of sale. The allegation is that the property had vested in the Seals and on a partition amongst the members of the Seal family, effected many years ago, had passed into the hands of Gobinlal Seal. The plaintiffs, the representatives in interest of Gobinlal Seal, applied to the Collector to withdraw the balance of the sale-proceeds, but the application was refused on the 19th October, 1909. They accordingly instituted this suit on the 5th September, 1916, for declaration of their title to the property at the time of sale and, consequent thereto, their title to the surplus sale-proceeds. The plaintiffs claimed an eight-ninths share in the holding; the remaining one-ninth share, it is said, belongs to the eleventh defendant who did not join as plaintiff. They also joined as defendants the representatives of the Paikpara Raj family as also the representatives of the Seal family other than the heirs of Gobinlal Seal. The Secretary of State for India was also joined as a defendant. But subsequently, on the 16th October, 1917, the plaintiffs prayed that the name of the Secretary of State for India might be removed from the category of defendants. The suit was tried on the merits and was dismissed as barred by limitation under Act 120 of the first schedule to the Indian Limitation Act. The present appeal has been preferred by some of the plaintiffs, who claim seven-ninth share in the estate and in the money in deposit. The eleventh defendant who claims an one-ninth share and the seventh plaintiff who claims an equal share are respondents. The representatives of the Seals and the Singhs have also appeared before us. In our opinion, the suit should not have been dismissed.

There can be no question that the Collector properly refused to pay the surplus sale-proceeds to the plaintiffs and his order of the 19th October, 1909, is based upon a correct interpretation of section 31 of Act XI of 1859. It was pointed out by this Court in the case of *Secretary of State for India in Council* v. *Marjum Hosein Khan* (1) that under section 31 an assignee of the recorded proprietors is not their representative, so that the Collector is justified in refusing to pay to such assignee, claiming on his own behalf, the money held in deposit on account of the recorded proprietors.

(1) (1885) I. L. R. 11 Calc. 359.

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Mookerjee, J.

Mr. Justice Pigot pointed out that the section does not contemplate payment to an assignee who claims to receive the money on his own behalf. It does not cast on the Collector the duty of giving effect to, and as a preliminary, of varifying of such assignments. But although the order of the Collector was right, it does not follow that the plaintiffs are not entitled to the declaration which they seek. The Legislature did not contemplate that the title of unrecorded proprietors should be lost by the sale to the extent that they would not be entitled to receive the surplus sale-proceeds, even if they could establish in the civil Court, as against the recorded proprietors, that they were entitled to the estate at the time of the sale. In the case before us, neither the Singhs who are the representatives of the last recorded proprietors, nor the Seals who admitted that on a partition the property passed to one member of their family, put forward any claim to the surplus sale-proceeds. Consequently, the surplus sale-proceeds belong to the plaintiffs and the eleventh defendant. This is established by the uncontradicted testimony of the witnesses who have been examined in the case. In these circumstances, the proper decree to make is to declare that the plaintiffs were entitled to $\frac{4}{5}$th share and the eleventh defendant to $\frac{1}{5}$th share in the estate at the time of the sale and are consequently entitled to the surplus sale proceeds in the same proportion. The plaintiffs and the eleventh defendant will be at liberty to apply to the Collector on the basis of this decree. If the Collector refuses to pay the surplus sale proceeds, the plaintiffs and the eleventh defendant may have their remedy; but it is not for us to advise them what course they should pursue if such a contingency should arise. It is sufficient to hold that, in so far as the present litigation is concerned, no question of limitation arises. If Art. 120 is held applicable, time should run against the plaintiffs from the date when the right to sue accrued. The right to sue does not accrue till the right to obtain relief by way of declaration has been denied. Events show that there has not been a dispute amongst the parties entitled to the money antecedent to the suit and during the course of the litigation, the parties appear to have agreed that they were entitled to the estate and the money value thereof in the shares already set out.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and a decree made in this Court in the terms indicated above. There will be no order for costs in this Court. The order of the Court below as to costs will stand.

A. T. M. *Appeal allowed.*

Before Sir Nalini Ranjan Chatterjea, Knight, Judge and Mr. Justice Panton.

BHOIRAB CHANDRA BOSE

v.

ANATH NATH DE AND OTHERS.*

CIVIL.

1920.

January, 2, 23.

Equitable mortgage—Memorandum embodying contract—Title deeds, deposit of.

Where the memorandum accompanying an equitable mortgage, does not embody the contract between the parties, but is a mere record of certain facts, an equitable mortgage may be established by the mere deposit of title deeds and the advance of money on such deposit, notwithstanding the provisions of the Registration Act.

Defendant No. 1 mortgaged certain properties to the plaintiff under two successive mortgage bonds, and delivered to him the title deeds of the property. Subsequently, she took a loan of Rs. 1,500 on executing the promissory note in suit. Simultaneously with the promissory note in question, a letter passed from her showing that the title deeds which remained in deposit with the plaintiff would remain as security for repayment of the loan. The memorandum was written after the promissory note, and after that the plaintiff made the payment of Rs. 1,500.

Held, that there was no mortgage created before the letter was written.

Appeal by Defendant No. 2.

Suit for realisation of money due on a supposed equitable mortgage.

The material facts appear from the judgment.

Dr. Jadu Nath Kanjilal and *Babu Mohini Nath Bose* for the Appellant.

Babus Mahendra Nath Ray and *Ramani Mohan Chatterjee* for the Respondent.

C. A. V.

The judgment of the Court was as follows:

January, 23.

This appeal arises out of a suit upon an equitable mortgage. It appears that the defendant No. 1 had mortgaged certain properties to the plaintiff under two successive mortgage bonds, and delivered to him the title deeds of the property. Subsequently on

* Appeal from Appellate Order No. 213 of 1918, against an order of A. H. Cuming Esq., District Judge of 24-Perganas, dated the 1st May, 1918, reversing that of Babu Jagadish Chandra Goswami, Subordinate Judge, 4th Court, of 24-Perganas, dated the 25th September, 1916.

See *Gokul Dass* v. *Eastern Mortgage Agency Company* (1905) I. L. R. 33 Calc. 410; 4 C. L. J. 102—Rep.

CIVIL.

1920.

Bholrab Chandra v. Anath Nath.

the 25th February, 1914, she took a loan of Rs. 1,500 upon the security of the title deeds; executing a promissory note for the said amount. A letter was written by her on the same date to the plaintiff and which ran as follows:—"Dear Sir. For repayment of the sum of Rs. 1,500 with interest I have borrowed from you on a pro-note of date I hereby put on record that the title deeds re my premises No. 1 Garpar Road already deposited with you shall be held as collateral security."

The question for consideration was whether the transaction constituted a valid equitable mortgage. The Court of first instance held that the letter not being registered was inadmissible in evidence and dismissed the suit. On appeal the learned District Judge held that it did not require registration, that an equitable mortgage was created and accordingly decreed the suit. The defendant No. 2 who is the subsequent purchaser of the property and who contested the suit has appealed to this Court.

The question whether there was an equitable mortgage depends upon the question whether the letter constituted the contract of mortgage, or whether there was a mortgage independently of it, and the letter was merely a memorandum of facts from which the contract might be inferred. As stated in Sir Rash Behari Ghose's Law of Mortgage 4th Edition page 155 "where the memorandum accompanying an equitable mortgage, does not embody the contract between the parties but is a mere record of certain facts an equitable mortgage may be established by the mere deposit of title deeds and the advance of money on such deposit, notwithstanding the provisions of the Registration Act.

Our attention has been drawn by the learned Pleader for the appellant to the statements of the plaintiff in his deposition which run as follows:—"Again in 1914, she needed money and borrowed Rs. 1,500 on executing the promissory note in question. Simultaneously with the promissory note in question a letter passed from her Ammukhtear showing that the title deeds which remained in deposit with me would remain as security for repayment of the loan The memorandum was written after the promissory note, and after that I made the payment of Rs. 1,500. Narain said to me that the title deeds which were left with you with the mortgages would remain with you. I am giving you a promissory note and a letter saying that you will be able to keep in deposit the title deeds and you advance Rs. 1,500 so I agreed to the proposal. After that he wrote the promissory note, took the money Rs. 1,500 from me and wrote the memorandum and went away."

The payment of the amount therefore was made subsequent to the letter and under the circumstances it cannot be said that there was a complete contract of mortgage before the letter was passed. It is true that in the letter it is stated that "I hereby put on record that the title deeds already deposited with you shall be held as collateral security" and it is contended on behalf of the respondent that the words *put on record* show that it is merely a memorandum of what had taken place. But the title deeds were with the plaintiff, and it was by the letter, that the defendant No. 1 agreed that the title deeds already deposited should be held as collateral security, and the plaintiff himself states that "the memorandum was written after the promissory note, and after that I made the payment of Rs. 1,500."

In the case of *Kedarnath Dutt* v. *Sham Lall Khettry* (1) upon which reliance was placed on behalf of the respondent, the plaintiff made an advance of money to B on the deposit of the title-deeds of property belonging to the latter which title-deeds were obtained by plaintiff in the morning on an agreement which was not then reduced to writing. In the evening a writing was made over to plaintiff in which B promised to pay him a sum specified with interest for value received in cash. It bore an endorsement depositing as collateral security the title deeds in question by way of equitable mortgage. Plaintiff sued for a declaration that he held a valid equitable mortgage and for an account to be taken. It was objected that the memorandum endorsed on the promissory note ought to have been registered.

Couch, C.J., referring to the letter observed "If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement it would be the instrument by which the equitable mortgage was created and would come within section 17 of the Registration Act. But it was not a writing of that character. As I have said the equitable mortgage was created by the agreement which was evidenced by the loan and the deposit of the title deeds"......"But as regards the contract between the parties if there had been no memorandum at all on the promissory note there would have been a complete equitable mortgage.....It is not by the memorandum that the Court takes the agreement for the mortgage to be proved but by the deposit of the deeds. This is no more than a piece of evidence

(1) (1873) 20 W. R. 150; 10 B. L. R. 405.

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showing the fact of the deposit which might be proved by any other evidence. The memorandum need not have been produced."

In the present case as pointed out above it was by the letter that the title deeds were deposited, and the money was paid after the letter was written. There was therefore no mortgage created before the letter was written.

This case appears to be somewhat similar to the case of *Dwarka Nath* v. *Sarat Kumari* (1). There the defendant deposited certain title deeds with the plaintiff as security for money due on a bond executed by the defendant in favour of the plaintiff. The deeds were sent with a letter from the defendant to the plaintiffs' attorneys "I have the pleasure of handing to you the title deeds of a house No. 56 Lower Circular Road as a collateral security for the Rs. 20,000 which falls due this day. Please accept them from my manager." Phear, J., observed:—"I cannot separate this letter from the transaction of the deposit of the title deeds. It explains why the deeds are deposited and states that the deposit is made as a collateral security of Rs. 20,000. This is not a case in which the charge on land is implied from the deposit of the deeds themselves, neither it is a case where the charge or the equitable mortgage is made expressly by parol. But it is as I understand the plaint itself a case where the basis of the plaintiffs' claim is a written document signed by the owner of the property and it appears to me that the document, and nothing else creates the charge. It is therefore such a document as ought to be registered under the terms of the Registration Act and cannot be admitted in evidence unless it is registered."

It is true that in the letter in the present case it was stated "I put on record" that the title deeds.....shall be held as collateral security. But without the letter or verbal communication there would have been nothing to attach the debt to the deposit of the deeds, and the money itself was paid after the letter.

In these circumstances, we think that the Subordinate Judge was right. The order of the Lower Appellate Court must accordingly be set aside, and that of the Court of first instance restored with costs.

A. T. M. *Appeal allowed.*

(1) (1871) 7 B. L. R. 55.

Before Sir Charles Chitty, Knight, Judge, and Mr. Justice Panton.

CIVIL.

1919.

January, 28, 29. February, 3.

CHUNI LAL HALDAR

v.

MOKSHADA DEBI AND OTHERS.*

Hindu widow—Administratrix—Selling immovable property with the leave of Court—Purchaser, if to prove legal necessity—Propriety of order or decree, if can be challenged collaterally.

There is nothing in the Probate and Administration Act, which would justify a differentiation between the powers of an administratrix, who happened also to be a Hindu widow and heiress of her husband, and those of any other administrator under the Act.

A purchaser of property from a Hindu widow, who was an administratrix of her husband's estate, by virtue of leave obtained from the Judge of the Probate Court, is not required to prove the legal necessity for sale: *Kamikhya* v. *Hari* (1) followed.

The propriety of an order or decree made in a cause, in which the Court has jurisdiction, cannot be challenged collaterally. This principle is applicable to a case where a party is seeking in Land Acquisition proceedings to go behind an order of the District Judge passed in his Probate jurisdiction many years ago: *Bhairab* v. *Nandiram* (2) referred to.

Appeal by Claimant No. 6.

Apportionment proceedings before the President of the Tribunal under the Calcutta Improvement Act, 1911.

The material facts appear from the judgment.

Babus Sarat Chandra Roy Chowdhury, Peary Mohan Chatterjee (for *Babu Mohini Mohan Chatterjee*) and *Krishna Lal Banerjee* for the Appellant.

Babus Provas Chandra Mitter, Surendra Madhab Mullick and *Bejoy Kumar Chatterjee* for the Respondents.

C. A. V.

February, 3.

The Judgment of the Court was as follows:

This is an appeal by Chuni Lal Halder claimant No. 6 and arises out of apportionment proceedings before the President of the Tribunal under the Calcutta Improvement Act, 1911. The respondents are Mokshada Debi claimant No. 5 and Upendra Nath Sen claimant No. 8. By a declaration dated 16th February, 1915, 5 cattas 3 chittaks and 4 sq. ft. of land were acquired under the

* Appeal from Original Decree No. 101 of 1917 against the decree of S. C. Banerjee, Esq., President of the Calcutta Improvement tribunal, dated the 19th February, 1917.

(1) (1899) I. L. R. 26 Calc. 607 [See *Annada* v. *Atul* (1919) 31 C. L. J. 3—Rep.]

(2) (1917) I. L. R. 46 Calc. 70 (72).

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Act, the total compensation awarded being Rs. 4,588-0-8. The property originally belonged to Kali Charan Haldar. He had three sons Rajkumar, Krishna Kishore and the appellant. Both the two first are dead. Mokhoda Debi is the widow of Krishna Kishore. On 8th March 1884 Mokshada Debi obtained Letters of Administration to her husband's estate from the District Judge of the 24 Pergannas. On 1st April 1890 she further obtained from the District Judge under section 90 of the Probate and Administration Act 1881 leave to sell certain property of the husband, including his one-third in the land now acquired, for not less than Rs. 2,000. On the following day she sold all except one of the properties, which she had permission to sell, to Chandra Kissore Sen, the predecessor-in-interest of claimant No. 8. The property thus sold amounts to 1 catta 8 chittaks and 25 sq. ft. of the land now acquired and is represented by the sum of Rs. 1151-0-8 part of the Rs. 4,585-0-8. The appellant maintained that the sale was good only for the life of Mokshada Debi and he asked that this sum might be dealt with under section 32 of the Land Acquisition Act. The President decided against him and ordered payment of the Rs. 1,151-0-8 to claimant No. 8. Hence this appeal.

For the appellant six contentions were urged:—

(1) That claimant No. 8 having purchased from a Hindu widow and having adduced no evidence of legal necessity, was only entitled to the property so purchased for her life.

(2) That the President erred in holding that the permission to sell was sufficient to prove the validity of the sale against the reversioner.

(3) That the reversioner as a third party was not bound by the order of permission to sell granted in his absence.

(4) If the order is to be taken as relieving the purchaser from proving legal necessity it must be shown that the District Judge considered it.

(5) That the order of permission was without jurisdiction inasmuch as Mokshada Debi had at the date of the order ceased to be administratrix.

(6) Assuming that the District Judge could make the order, the transaction of sale was in fraud of the reversioner, and the order fraudulently obtained from the Court on suppression of the true facts and by false representations of all which the purchaser was well aware.

The first two grounds are concluded against the appellant by the

decision in *Kamikhya Nath Mukerjee v. Hari Churn Sen* (1), and it was argued that that decision is not correct, that it is opposed to the principles of Hindu Law, and that it had not been followed. It transpired that the learned Pleader used the last expression not in its ordinary sense, that the decision had been since considered by other Benches of this Court who had declined to follow it, but that he had been unable to find any subsequent reported decision, in which it had even been cited. It stands in the Reports as the decision of this Court and we are bound either to accept and follow it, or, if we doubt its correctness, to refer the question to a Full Bench. This we are certainly not prepared to do, as we are in full agreement with it. To hold otherwise would be to introduce an unwarrantable qualification into the express provisions of the Probate and Administration Act with regard to Hindu widows. There is nothing in that Act which would justify a differentiation between the powers of an administratrix, who happens also to be a Hindu widow and heiress of her husband and those of any other administrator under the Act.

The next three contentions of the appellant question the propriety of the order of the District Judge allowing Mokshada Debi as administratrix to sell the property. It is not open to the appellant in these proceedings thus to go behind the order, nor can we review the order to see if in the circumstances it was correctly made. For instance in ground (5) the appellant suggests that the order was without jurisdiction because the applicant was then no longer administratrix. It must however be presumed that the District Judge satisfied himself on that point before making the order in her favour as such administratrix. The case cited by the learned Pleader for the appellant "*In the goods of Nursing Chunder Bysack* (2), shows how the Court will examine the matter. We cannot presume that the District Judge failed in his duty in this respect or in his consideration of the other matters, on which he had to be satisfied before he could properly make the order. As was pointed out in *Bhairab Chandra Dutt v. Nandiram Agrani* (3) "the propriety of an order or decree made in a cause, in which the Court has jurisdiction, cannot be challenged collaterally." That general principle may well be applied in a case like the present, where the appellant is seeking in Land Acquisition proceedings to go behind an order of the District Judge passed in his Probate jurisdiction some 28 years ago.

(1) (1899) I. L. R. 26 Calc. 607.
(2) (1899) 3 C. W. N. 635.
(3) (1917) I. L. R. 45 Calc. 70 (72).

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The sixth and last contention impugns the District Judge's order as vitiated by fraud. It is questionable whether the appellant can so impugn the order in these proceedings, but assuming that he could do so, it is sufficient to say that we entirely agree with the learned President that no case of fraud has been made out in this case, and, in particular, the appellant has completely failed to show that the purchaser was in any way privy to it. There were no distinct allegations by the appellant of the fraud charged and the arguments on his behalf appeared to rest on vague suggestions made against a third party.

The appeal fails on all points and is dismissed with costs to the respondents who have appeared. Hearing-fee 4 gold mohurs to Complainant No. 8 and 2 gold mohurs to Complainant No. 5.

A. T. M. *Appeal dismissed.*

Before Sir Asutosh Mookerjee, Knight, Judge and Mr. Justice Panton.

CIVIL.
1919.
August, 21.

ILIM MOLLA AND ANOTHER
v.
MANINDRA MOHAN PODDAR AND OTHERS.*

Res-judicata—*Execution for costs—Mortgage decree—Sale insufficient to pay off the mortgage decree—Subsequent application for execution of decree for costs—No supplemental decree under Order 34, rule 6 of the Code of Civil Procedure (Act V of 1908).*

The respondent joined the appellants as defendants in the mortgage suit on the allegation that they were transferees of the equity of redemption. He obtained the usual mortgage decree specifying the amount due on the mortgage and the costs of the suit. The appellants were not made personally liable for the costs. Execution was taken out in due course and the mortgage decree was satisfied in part. But although the mortgaged properties had been exhausted a considerable sum still remained due to the decree-holder. The decree-holder thereupon applied for execution. The office raised a question as to whether execution could be had before the decree-holder had obtained a supplemental decree in accordance with order 34, rule 6 of the Code of Civil Procedure. The Court thereupon directed the record should be sent for and that the matter should be put up for consideration in the presence of the decree-holder. No notice of the application was served upon

* Appeal from appellate Order No. 147 of 1918, against the order of S. E. Stinton, Esq., District Judge of Dacca, dated the 12th February, 1918, affirming that of Babu D K. Mukerjee, Munsiff, 3rd Court, at Munshiganj, dated the 1st December, 1917.

the present appellants or upon any of the other judgment-debtors. The Court subsequently came to the conclusion (and this was an *exparte* decision) that a supplemental decree was not necessary and that execution could issue on account of costs against the present appellants. Execution was issued with the result that the present appellants forthwith appeared before the Court and objected that they were not liable under the decree. The Court over-ruled the objection and held that as the matter was previously decided they were bound by that order :

Held, that the order did not operate as a *res-judicata* : *Mungul Pershad* v. *Grija Kant* (1) distinguished.

Appeal by the Defendants.

Application for execution of decree for costs.

The material facts appear from the judgment.

Babu Bimal Chandra Das Gupta for the Appellants.

Babu Paris Chandra Sen for the Decree-holder Respondent.

The judgment of the Court was delivered by

August 21.

Mookerjee, J. : This is an appeal against an order of the District Judge of Dacca made in affirmance of an order of the Court of first instance to the effect that the appellants are liable to satisfy a decree for costs made in favour of the respondent in a suit to enforce a mortgage-security. The respondent joined the appellants as defendants in the mortgage suit on the allegation that they were transferees of the equity of redemption. He obtained the usual mortgage decree specifying the amount due on the mortgage and the costs of the suit. The decree directed that if this sum was not paid within the period of grace by the defendants to the plaintiff, the mortgaged property or a sufficient part thereof would be sold and the sale proceeds applied in satisfaction of the decree. Execution was taken out in due course and the decree was satisfied in part. But although the mortgaged properties had been exhausted, a considerable sum still remained due to the decree-holder. The decree-holder thereupon applied for execution. The office raised a question as to whether execution could be had before the decree-holder had obtained a supplemental decree in accordance with Order 34, rule 6 of the Code of Civil Procedure. The Court thereupon directed that the record should be sent for and that the matter should be put up for consideration in the presence of the decree-holder. No notice of the application was served upon the present appellants or upon any of the other judgments-debtors. The Court subsequenly came to the conclusion (and this was an *exparte* decision) that a supplemented decree was not necessary and that

(1) (1881) I. L. R. 8 Calc. 51 ; L. R. 8 I. A. 123.

CIVIL.

1919.

Ilim Molla v. Manindra.

Mookerjee, J.

execution could issue on account of costs as against the present appellants. Execution was issued with the result that the present appellants forthwith appeared before the Court and objected that they were not liable under the decree. The Court held that the matter had been previously decided and that they were bound by that order. They appealed, but to no purpose and the order of the first Court was confirmed. This view cannot be supported. As explained by Mr. Justice West in *Budan* v. *Ramchandra* (1). There is no room in such circumstances for the application of the principle laid down by the Judicial Committee in the case of *Mungul Pershad Didul* v. *Grija Kant Lahiri* (2). That decision is based on the ground that if a party to an execution proceeding who had an opportunity to take exception to a proposed order of the Court has omitted to object, he is bound in the same way as if an adverse order had been made in his presence. In the case before us, the appellants had no notice of the application by the decree-holder. Indeed, the only matter for consideration before the Court at that stage was whether execution could proceed without a supplemental decree under Order 34, Rule 6. The Court could not have intended to decide, in the absence of the judgment debtor, and without notice to them, the question of their liability under the decree. We must consequently hold that the orders of the Courts below cannot be supported. The question now arises whether the matter should be remitted to the Court of first instance for consideration. Fortunately it is not necessary to do so. The decree has been produced before us and shows, on the face of it, that the defendants are not personally liable for the costs.

The result is that this appeal is allowed, the order of the Court below set aside and the application dismissed with costs, both in this Court and in the Court below. We assess the hearing-fee in this Court at one gold mohur.

A. T. M. *Appeal allowed.*

(1) (1887) I. L. R. 11 Bom. 537.

(2) (1881) I. L. R. 8 Calc. 51 ; L. R. 8 I. A. 123.

Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton.

MAHARAJA SIR RAMESWAR SINGH BAHADUR

v.

CHUNI LAL SHAHA AND OTHERS.*

CIVIL. 1919. August, 11, 12.

Receiver—Mortgagee's right to appoint receiver—Mortgagee's right to profit—Receiver appointed by the first mortgagee in presence of mortgagor and second mortgagee—Second mortgagee purchasing equity of redemption, effect of.

A receiver may be appointed at the suit of a first mortgagee when there is reason to apprehend that the property was insufficient to pay the incumbrances thereon: *Herbert* v. *Greene* (1) referred to.

Whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a receiver, if the demands of justice require that the mortgagor should be deprived of possession.

A receiver can be appointed at the instance of a mortgagee who holds a simple mortgage.

A receiver who was appointed in the presence of the mortgagor and the second mortgagee at the instance of the first mortgagee, holds the property for his (first mortgagee's) benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. The order for the appointment of the receiver was binding upon the mortgagor and the second mortgagee. The fact of the second mortgagee's obtaining a decree on his mortgage in the absence of the first mortgagee and purchasing the equity of redemption in execution of that decree, did not alter his position in relation to the receiver at the instance of the first mortgagee.

Appeal by the first Mortgagee.

The material facts appear from the judgment.

Mr. N. Sarkar and *Babu Ambicapada Chowdhury* for the Appellants.

Babu Gobinda Chandra Dey Roy for the Respondents.

The judgment of the Court was delivered by

Mookerjee, J.: This appeal is directed against an order made on the Receiver in a mortgage-suit, who was appointed at the instance of the first mortgagee, now appellant before us. It appears that on the 4th May, 1915, the first mortgagee who held a mortgage over the entire property instituted a suit to enforce his security, against the mortgagor and the second mortgagee. Seven days later, he applied for the appointment of a Receiver for the preservation of the pro- August, 12.

* Appeal from Order No. 84 of 1919, against the order of Babu A. T. Pal, Subordinate Judge, 2nd Court, of Dacca, dated the 25th February, 1919.

(1) (1854) 3 Ir. Ch. 270 (274).

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perty, for payment of arrears of rent due to the superior landlord, for the realization of rent and other incomes from the property and for the payment of the income to the plaintiff in reduction of his claim under the mortgage. The Subordinate Judge made a conditional order for the appointment of a Receiver on the same day The order was made absolute on the 15th July, 1915. Since then, the Receiver has been in possession and the order for payment of the profits in reduction of the dues on the first mortgage has been duly carried out. On the 12th July, 1916, the mortgagee obtained a decree for Rs. 1,21,540. Meanwhile the second mortgagee, who held a mortgage on one-half only of the property, had instituted a suit to enforce his security, without joining the first mortgagee as a party. He obtained a decree on the 2nd August, 1915 for the sum of Rs. 6,177. This decree was put into execution, and, at the sale which followed, the second mortgagee purchased the equity of redemption in relation to his mortgage for a sum of Rs. 425 on the 10th August, 1916. It appears that during the pendency of these proceedings, the second mortgagee had managed to obtain an order in his suit directing the Receiver to pay him a portion of the income in his hands derived from the mortgaged property. What followed is not clear, but we find that on the 23rd August, 1918, the second mortgagee made an application to the Court for the purpose of intercepting the whole of the income of the property purchased by him and to receive the amount for the satisfaction of his own dues. This application was opposed by the first mortgagee but the Subordinate Judge made an order in favour of the second mortgagee on the 25th February, 1919. The legality of this order is called in question in the present appeal.

On behalf of the first mortgagee, it has been contended that the order for the appointment of a Receiver of the 11th May, 1915, is binding upon the mortgagor as also the second mortgagee in whose presence it was made and that the circumstances which had happened did not justify a modification of that order. Our attention has been invited to the case of *Penney* v. *Todd* (1), where it was ruled that the possession of a Receiver in a mortgage suit was *prima facie* for the benefit of the party who had obtained the appointment. On this principle it has been argued that the Receiver who was appointed at the instance of the first mortgagee holds the property for his benefit alone and, is bound to make over to him the entire income for the satisfaction of his dues. In our opinion this contention is clearly well-founded.

(1) (1878) 26 W. R. (Eng.) 503.

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The order for the appointment of the Receiver made conditionally on the 11th May, 1915, and confirmed on the 15th July, 1915, was passed in the presence of the mortgagor as also the second mortgagee. They are equally bound by the order in question. Nothing has happened since then which would entitle either of them to avoid the consequences of that order. The second mortgagee has contended that the fact that he has obtained a decree on his mortgage and has purchased the equity of redemption in execution of that decree has altered the position. We are of opinion that there has been no change in his position in relation to the receiver at the instance of the first mortgagee. If neither the second mortgagee nor the mortgagor is entitled to question the propriety of the order for the appointment of the Receiver, the circumstance that the equity of redemption has been transferred from the mortgagor to the second mortgagee cannot place the latter in a position of advantage. In his character as purchaser in execution of his own decree, he is as much bound by the order for the appointment of the Receiver as the mortgagor. If the mortgagor had made an application to the Court to modify the order for the appointment of the Receiver and had attempted to intercept the profits, no Court would have listened to him. The second mortgagee does not now stand in a different position. An argument was addressed to us on the assumption that the first mortgagee was a mortgagee by way of conditional sale and that as such he had obtained a decree for foreclosure. In this assumption it was argued, under authority of the decision in *Khubsurat Koer* v. *Saroda Charan Guha* (1), that a Receiver should not have been appointed at his instance. On an examination of the record, however, it transpires that the decree was for sale of the mortgaged properties, consequently no question can arise as to the propriety of the order for the appointment of a Receiver. It was suggested by the second mortgagee that a Receiver could not be appointed at the instance of a mortgagee who held a simple mortgage. We are unable to accept this contention as well founded on principle; there is indeed authority for the contrary view: *Sri Raja* v. *Busui Reddy* (2). There is no foundation for the contention that a mortgagee who is not entitled to possession of the mortgaged properties is not entitled to ask for the appointment of a Receiver, whether the mortgagee is or is not entitled to possession he may invite the Court to appoint a Receiver, if the demands of justice require that the mortgagor should be deprived of possession. The principle applicable

(1) (1911) 14 C. L. J. 526. (2) (1914) Mad. W. N. 77.

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to cases of this character was lucidly stated in the case of *Herbert* v. *Green* (1) : "In a foreclosure suit or a suit to raise a charge affecting lands by sale of the lands, an order is not made for the appointment of a Receiver unless under the following circumstances : First, where interest is due on the security, the Court usually requiring an affidavit that interest for one year at least is due ; or secondly, where the property is in danger, for example, if the lands are held under a lease and head rent has been permitted to remain unpaid and in arrears ; thirdly where there is reason to apprehend that the sum for which the lands shall be sold will be insufficient to pay the encumbrances or charges therein." [See also *Weatherall* v. *Eastern Mortgage Agency Co.* (2) ; *Eastern Mortgage Agency Co.* v. *Fakiruddin* (3)] ; If we examine the case from a somewhat different point of view, the unreasonableness of the argument advanced on behalf of the second mortgagee becomes still more patent. If the property is not of sufficient value to meet the dues of all the encumbrances, it is clear that when the property is sold, the first mortgagee will be paid first and thereafter the remainder, if any, will be applied in discharge of the claims of the second mortgagee. It is inconceivable that if the relation between the first mortgagee and the second mortgagee is of this description, the latter by purchasing the equity of redemption, should become entitled to intercept the profits of the mortgaged property before the dues of the first mortgage has been satisfied.

The result is that this appeal is allowed the order of the Court below set aside and the application of the 23rd August 1918 dismissed with costs in both the Courts. We assess the hearing-fee in each Court at five gold mohurs.

A. T. M. *Appeal allowed.*

(1) (1854) 3 Ir. Ch. Rep. 270 (274).
(2) (1911) 13 C. L. J. 495.
(3) (1912) 17 C. W. N. 16.

Before Mr. Justice N. R. Chatterjea, and Mr. Justice Panton.

AFTABUDDIN AHMED AND OTHERS

v.

JOGENDRA NARAIN TEWARI AND OTHERS.*

CIVIL.

1919.

December, 1.

Limitation—Decree, execution of—Limitation Act (IX of 1908), Sch. I. Art. 182 Cl. (5)—Application in accordance with law—Application for substitution of legal representatives.

An application was made for execution of decree on the 26th March, 1912. Subsequently on the 26th March, 1915, another application for execution was made. The judgment-debtor died before that application was made. The decree-holder therefore prayed in that application that the legal representatives of the deceased judgment-debtor might be substituted in his place after issue of notice to them, and that the decretal amount be realised by attachment of movables. The Court thereupon made an order that the process fee be paid within three days for service of notice on the legal representatives of the deceased judgment-debtor. The fee, however, was not paid and the execution case was dismissed on the 30th March, 1915. On the 16th February, 1917, the present application for execution was made:

Held, that the present application was not barred, as the application dated 26th March, 1915, was in accordance with law within the meaning of article 182 cl. (5) of the Limitation Act.

Appeals by the Decree-holders.

Applications for execution of decrees.

The material facts appear from the judgment.

Moulvi Fuzlul Huq and *Babu Probodh Chandra Kar* (for *Babu Atindra Nath Mukherjee*) for the Appellants.

Babu Upendra Narain Bagchi for the Respondents.

The judgments of the Court were as follows:

M. A. No. 319 of 18.—The only question involved in this appeal is whether the application for execution of the decree is barred by limitation. *December 1.*

It is unnecessary to refer to the first two applications for execution. The third application was made on the 26th March, 1912, and the fourth on the 26th March, 1915.

It appears that the judgment-debtor died before the fourth application for execution.

The decree holder prayed in that application that the legal

* Miscellaneous Appeals from Orders Nos. 319 of 1918 and 40 of 1919, against the orders of R. E. Jack, Esq., District Judge of Nadia, dated the 6th September, 1918, reversing those of Babu Kali Kumar Sarkar, Subordinate Judge of Nadia, dated the 28th June, 1917.

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representatives of the deceased judgment-debtor might be substituted in his place after issue of notice to them, and that the decretal amount be realised by attachment of movables. The Court thereupon made an order that process fee be paid within three days for service of notice on the legal representatives of the deceased judgment-debtor. The fee, however, was not paid and the execution case was dismissed on the 30th March, 1915.

The present application for execution was made on the 16th February, 1917 and the question is whether the application of the 26th March, 1915, was an application which saved limitation. That application was made within three years of the last previous application. It was also made to the proper Court. The only question therefore is whether it was in accordance with law.

The Court below has held that it was not in accordance with law, because the legal representatives of the judgment-debtor were not substituted, as the process-fee had not been paid, as directed by the Court.

Order 21, rule 22 Civil Procedure Code lays down that where an application for execution is made (b) against the legal representative of a party to the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for, requiring him to show cause on a date to be fixed why the decree should not be executed against him. That is what is required by law to be done. Now if the contention of the respondent is correct namely that in order that the application might be held to be in accordance with law, the legal representatives of the deceased judgment-debtor must be already on the record, then there cannot be any application for execution in accordance with law, against the representatives of the deceased judgment-debtor on the last day of three years, if the judgment debtor happens to die on the last day, although the decree-holder may be within his rights to make the application on such last day.

Then again, we do not see how the fact that process-fee was not paid subsequently, as directed by the Court, could affect the validity of the application made on the 26th March, 1915. If it was a valid application and one in accordance with law on the 26th March, 1915, it could not be invalidated by any subsequent act on the part of the decree-holder, namely, the non-payment of the process-fee. In the absence of any authority to the contrary, we think the application was in accordance with law within the meaning of article 182 clause (5) of the Limitation Act and therefore the present application is not barred.

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There are, however, other objections raised by the judgment-debtor, which have not been gone into by the lower appellate Court.

The order of the lower Court must therefore be set aside and the case sent back to that Court in order that it may deal with the other questions raised in the case, and dispose of the case according to law.

Costs—one gold-mohur to abide the result.

This judgment will govern the other appeal (No. 40 of 19).

A. T. M. *Appeals allowed: cases remanded.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Asutosh Mookerjee, Knight, Judge, and Sir Ernest Edward Fletcher, Knight, Judge.

BALMUKUND RINA

v.

GOPIRAM BHOTICA.*

CIVIL.
1920.
January, 14.

Award—Successive awards in same matter—Several and separate contracts—Arbitration clause.

There may be successive awards even in the same matter: *Chandanmull* v. *Donald* (1) referred to.

When there are several and separate contracts, the right conferred by the arbitration clause is not exhausted as soon as a complete award is made upon the first reference.

Appeal by the Plaintiff.

Suit to restrain two arbitration proceedings pending before the Tribunal of Arbitration of Bengal Chamber of Commerce.

The suit was dismissed by the following judgment of

1919.
January, 21.

Rankin, J.—By a contract of 1st December 1917 made on the ordinary form of the Indian Jute Manufacturer's Association the plaintiff agreed to sell to the defendant three lacs of yards of Hessian cloth. The only express terms which require notice are three:—

Delivery of the said goods to be given and taken as follows:—December 1917.

*Appeal from Original Decree No. 6 of 1919, against the decree of Mr. Justice Rankin, dated the 21st January, 1919.

(1) (1916) 23 C. W. N. 707 foot note.

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Each month's delivery to be treated as a distinct and separate contract.

Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce applicable for the time being for decision, and such decision shall be accepted as final and binding on both parties to this contract. The award may at the instance of either party, and without any notice to the other of them, be made a rule of the High Court of Judicature at Fort William.

These three terms are all part of the printed form with the exception of the words "December 1917" at the end of the first.

The seller by his Counsel has been careful to make clear that it is not disputed that the contract is by the usage of this market an instalment contract in so far that it is open to the buyer to require delivery in separate quantities, at all events if each be not less than 50,000 yards; and in this further sense also that the buyer may if he likes require performance as to any such quantity taken separately either by giving due shipping instructions to the seller or by demanding Mill's *pucca* delivery orders.

Of the three lacs of yards contracted for, one half lac was duly delivered and may now be ignored. No delivery was in fact made of any part of the remainder, which divides itself into three separate lots.

The first lot is of 50,000 yards, for which a formal shipping instruction for the "City of Calcutta" was given on the 15th of December. Vessel was not ready to load. On 7th January buyer offers to take at once a delivery order. Delivery having been made in neither form, buyer on 18th January sends his difference bill by registered post claiming Rs. 8,759. Seller refuses to pay. On 28th February an arbitration by the Chamber of Commerce is demanded by the buyer, and proceedings strictly confined to this claim took their course under this demand resulting on 24th July in an award of the sum claimed to the buyer with certain interest and costs. This is the first arbitration case.

The second arbitration case had reference to 1,00,000 yards for which another shipping instruction was given on 15th December—this time for the "Chile." The seller finding that the vessel would not begin loading till the 2nd of January, disclaimed responsibility. Buyer insisted. On the 7th January buyer asked for immediate shipment or else delivery order. On the 18th buyer sends another difference bill—this time for Rs. 17,750—on the footing of the price at which the goods had been bought against

him by his buyer. On the 19th the seller tendered delivery orders which were refused. On the 21st the seller returned the difference bill and claimed to cancel the contract because of that refusal. On some date before the 9th of April, Kanoria and Co., who had bought from the buyer, claimed arbitration between themselves and him. This had resulted in an award in their favour before the 24th of June. On the 9th of April the buyer's second case against the seller was commenced, claim being made in the alternative either for the amount of the difference bill or for such sum as might be awarded to Kanoria and Co.

The third arbitration case was not commenced till the 21st of June. It concerned two quantities of 50,000 yards each, one for the Chile and one for the Talabat. As to this I have only the buyer's case: the seller's case never having been lodged. The buyer claimed that shipping instructions were given on 14th and 21st December for these boats respectively; that on 2nd January 1918 he received two letters dated 29th December in which seller said the 'Chile' was not yet in port and that the 'Talabat' had left long before due date—that on the 3rd January buyer wrote that the goods for Talabat should be put on the City of Manchester and on the 4th that he would take Mill's pucca delivery order for the other lot—that in the end the seller did neither—that on 15th January the buyer gave notice that his buyers had bought against him as regards the City of Manchester consignment—that on 16th he demanded a delivery order for the other lot by the next day, and that next day his buyers had bought against him for this lot also—that the seller refused to recognize this liability—that afterwards buyer settled with one of his buyers on 25th February for 7,250 with seller's consent and on seller's promise to pay—that in May he settled with his other buyer for the same sum on the basis of an award obtained against that buyer by a firm to whom he had in turn resold.

Now all that seller did in the third arbitration case was, that on 18th July he applied to the Tribunal for time to file his case, and on 25th July for more time, and in the end was given till 3rd August by a letter dated 27th July.

On the 25th July, as I have said, an award in favour of the buyer was made in the first arbitration case between these parties, and by letters of 1st and 3rd August from seller's Solicitors to the Tribunal the seller set up his present claim that the Tribunal had no jurisdiction to proceed with the second and third cases, since in the matter of the Contract of 1st December there had been an

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award, which award they say, with complicated incorrectness, "has resulted in a decree." It is given as an additional ground that the claim in these cases had arisen completely at the time of the Tribunal's decision. In this action brought by the seller I have to say whether his contention is correct, and whether he is entitled to any relief accordingly.

It was argued for the seller that while the contract was for delivery by instalments, it was one single contract in the sense that there was one promise, one covenant to which all the breaches have reference—that once one award is made under the arbitration clause in a complete form capable of enforcement at law, the Tribunal is *functus officio* and there can be no jurisdiction to make a second—that in this case all the alleged breaches were complete sometime before the 25th February 1918 when the first arbitration case was started—that there was only one cause of action, *viz.* failure to fulfil the promise to deliver 3 lacs of yards—that the buyer has split up his cause of action and made three cases out of one—and that this course is so unjust and unreasonable that at all events the principle which underlies O. 2, r. 2, of the Civil Procedure Code, if not that Rule itself, should be applied by me as a ground for holding that the Tribunal has no jurisdiction to entertain the second and third proceedings now.

The buyer's Counsel in reply founded upon a custom, alleged in his Written Statement to obtain in this market, to the effect that when orders for delivery in different lots are given, the original contract becomes divided into as many contracts as there are separate lots.

He further raised an issue of fact that whether such custom exists or not, the seller has by his conduct assented to this contract being treated as several separate contracts.

Apart from these questions of fact, he took certain objections logically prior to these issues. He contended that the Tribunal has jurisdiction to decide both these issues and that they are not triable by me.

He contested the proposition that apart from such a custom, the first award precluded the Tribunal from entertaining the other cases.

As regards the principle of O. 2, r. 2, he said that this objection applied at the initiation of the other cases and that either it does not go to the jurisdiction of the Tribunal, or, if it does, the seller consented to such jurisdiction by filing his written answer in the second case on 11th June 1918 and by his applications to the Tribunal on 18th and 25th July for time to file his answer in the third.

Lastly, and as an answer good in all events, he said that where an arbitrator has not any jurisdiction in law no injunction or other relief is obtainable, to stay his hand, and the only course is to take objection when the nullity is sought to be enforced as valid.

To the contentions of the buyer as to custom the seller's Counsel intimated that he would contest the existence of the custom. He argued further that the custom was contrary to the express words "Each month's delivery to be treated as a distinct and separate contract," and was invalid as unreasonable.

I agreed that evidence as to the existence of the custom pleaded by the buyer should be reserved until after my decision on the prior points. The documents in the three arbitration cases were produced, and it was agreed that I should decide the preliminary points on these.

Now I will take the contract in the sense admitted by the seller, as stated at the commencement of this judgment, and I will examine as to whether or not he has established that the Tribunal is now without jurisdiction to decide the second and third Arbitration cases.

I. First, is it true of a submission, such as was in this contract, that under it there can be only one award, meaning thereby a final and complete award enforceable in law? In my opinion there may be an indefinite number of such awards, as many awards as there are disputes arising out of the contract. The submission, if it be in the terms which are present in this contract, is not exhausted by reason of the mere fact that one award, final and complete in itself, has issued from it. The Arbitrators are not *functus officio*: one item of their duty done, their duty remains their duty.

The completeness of the first award, so far as regards its own subject-matter, has no relevance to the present point. An award which is incomplete as regards a claim may yet be good if complete as regards those matters in dispute with reference to the claim, which were submitted to the arbitrators. In such a case it is possible to have two awards over the same claim because it is possible to have further disputes over the same claim—disputes not covered by the first award. An award final and complete as regards a claim precludes another as to that claim only: this not because the number of awards would be getting high, but because there is nothing further to dispute without disputing the award itself.

This is my view of the effect of the unreported case of *Chandanmull* v. *Donald Campbell & Co.* (1), decided in the House of Lords

(1) (1916) 23 C. W. N. 707 foot note.

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on 4th December, 1915. (The judgment in the Court of Appeal and the speeches of the Lords of Appeal will be found in the Paper Book in Appeal No. 42 of 1917 in this Court. Suit No. 1094 of 1916). The terms of the submission are for this purpose indistinguishable from those I have to deal with, and will be found at page 170 in the judgment of the present Master of the Rolls. Rule XXVI of the Bengal Chamber of Commerce Rules does not, in my opinion, cut down the jurisdiction of the Arbitrators to make awards from time to time in disputes arising out of the contract as such disputes arise.

II. In the second place on the footing that the breaches alleged in the later cases are all breaches of the same promise as grounded the first award, I have to decide whether the arbitrators are without jurisdiction to award upon them now. This contention of the seller must be put upon one or more of the following principles:—res judicata, bar by suit, principles of common law or equity analogous to these, or such a construction of the submission as would exclude from its ambit any right to entertain proceedings which, if before a Court of Justice, would be held an abuse of the process of the Court.

I think it will repay the trouble, to make the hypothesis that on 28th February, 9th April and 21st June the buyer had commenced three several suits in a competent Court subordinate to this Court for breaches all prior to the 28th of February, and had recovered judgment in the first suit on 25th July. In any case for the sake of clearness I will do so. I think the position then would have been as follows:—

(1) The lower Court would have had jurisdiction to decide whether the later cases come within Explanation IV in section 11 of the Code. I think it would be bound to hold that they do not: but if they do, and such Court wrongly held that they do not, the only remedy would be appeal. No question of jurisdiction would arise, and no remedy under section 115 of the Code would be appropriate. Such questions could only arise in a limiting case, e.g., if on the footing that section 11 did apply, the Court had refused to give effect to the law, or if it held wrongly on a point quite unarguable.

(2) The same observations apply to a plea under Order 2, r. 2, but with this difference. I think (assuming no such custom as the buyers allege) that such lower Court, to decide rightly, would have to hold that the later cases were hit by the rule. But again no ques-

tion of jurisdiction would arise if its decision was merely wrong; if e.g. it purported to dispense the plaintiff from the provisions of the Rule, that would be another matter. It is to be observed that the presence or absence of a judgment in the first suit would be wholly irrelevant in dealing with this plea.

(3) If, putting aside the Code, the plea to the later suits fell to be considered at common law, I think myself that to reject it would be right. Such an objection must be matter of substance and I think has to fulfil certain technical conditions even then. In *Brunsden* v. *Humphrey* (1), Bowen, L. J. said: "The rule of the ancient common law is that where one is barred in any action real or personal by judgment, demurrer, confession or verdict, he is barred as to that or the like action of the like nature for the same thing for ever." In the present case and on my hypothesis, would these actions be "for the same thing" in substance? I think there can be but one answer, and the only way to attempt another is to insist upon the unity of the promise as making the cause of action technically the same. On this I will quote further from the same great authority. "The principle is frequently stated in the form of another legal proverb, *Nemo debet bis vexari pro eadem causa*. It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been subject of the previous suit? "The principal consideration," says De Grey, C. J. in *Kitchen* v. *Campbell* (2) "is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case"— "And one great criterion," he adds, "of this identity is that the same evidence will maintain both actions"....." The question," says Grose, J. in *Seddon* v. *Tutop* (3) "is not whether the sum demanded *might have been* recovered in the former action, the only inquiry is, whether the same cause of action *has been* litigated and *considered* in the former action".....It is evident, therefore, that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance."

This passage, if only in view of the last words, covers and disposes of the objection which I am now considering in this case. I take the principles there laid down to be first principles, not mere

(1) (1884) L. R. 14 Q. B. D. 141 (146).
(2) (1772) 3 Wilson 304.
(3) (1796) 6 T. R. 607.

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axiomata media true only of the special range of facts then before the Court.

(4) Before parting with my hypothesis of these cases being brought as actions, I have only to say that if before the first had been decided, application had been made to strike out the others as oppressive, or as an abuse of the process of the Court, it would have been wrong and unreasonable to do more than to consolidate the actions and to make the buyer pay costs thrown away. If such application had been made after judgment in the first case, in view of the lateness of the application, it would probably have been wrong to accede to it at all so far as regards the second case. As to both second and third, an order to strike out would have been improper. Some terms as to costs would at the utmost meet the case.

When I come to consider the seller's contentions as applicable to proceedings by arbitration, none of his points as to want of jurisdiction become any stronger. If into this submission I am to import any conditions against multiplicity of arbitrations for the same thing, I know no better principles than I have stated from Lord Bowen and I should not be any stricter than the language of Section 11 of the Code which many Judges have thought too strict. But that is for the arbitrators and not for me. In *Donald Campbell's case*(1) Lord Sumner said this "Incidentally the effect of a prior award might come into question in an arbitration upon a dispute arising out of a contract if the defendants alleged and the claimants denied that the award already made had decided the matter in dispute."

If further I import into this submission an implied term which would exclude oppression or abuse of process, the facts here do not come within it.

Lastly, even if I stretch the principle of bar by mere suit to arbitration cases, I cannot make it go to jurisdiction, and, as the seller has taken steps in both of the later cases, my difficulty would be increased. Besides, I have no right or inclination to stretch it at all. O. 2, Rule 2, is a special provision doubtless of the completest wisdom, but unknown to the common law—one, moreover, which attaches an indiscriminate and indeed incalculable penalty to a condition difficult to define. There is, I think, a cardinal error involved in any attempt to appeal even to the principle on which the Rule is founded, for the jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute. And his right to entertain a second case depends not on the identity of the cause of

(1) (1916) 23 C. W. N. 707 foot note.

action, but on the identity of the matters in dispute. Where there has been an award not set aside, everything decided by it will be deemed conclusively to have been disputed. The first award if valid covers the whole of the issues raised and covers nothing else: any issue not raised is, if disputed, another dispute. In the case referred to already the House of Lords applied this principle to affirm the validity of a second award on what was really the same claim. Of such a case it is important to say, and I think the House of Lords has implied, that the second dispute must arise subsequently to the first. But in other cases such a requirement would be either meaningless or wrong. If a dispute exists now; if neither party treated the issue as in dispute upon the previous arbitration; if it is not in substance a dispute about the same thing or covered by the first award; then the most positive proof that the parties were in difference about it before the first case was launched, will not affect the Arbitrators' jurisdiction.

In the present case, whether the contract was one or several, there is no room for doubt that the three cases were distinct disputes about separate instalments. The shipping instructions are separate; the correspondence throughout is kept entirely separate on both sides; separate difference rates are claimed, separate difference bills delivered. Though under the same contract, they are in no way mixed up: the course of business requires that they should not be; buyer and seller as to each consignment being links in a chain which stretches between Mill and shipper—for all they know—links in a different chain as to each different consignment.

Having gone through the parties' statements in writing before the Tribunal, and the Exhibits submitted, I think the cases were very different in many ways. Each is a story with complications of its own: though the general nature and some important facts are the same in all. Whether on a true view of the parties' rights, the cases stripped of all irrelevance would become more similar or more divergent, is a question. It may even be that one short answer would decide them all. But the parties' own views are what constitute the dispute, and have in this case constituted three disputes.

For these reasons, apart altogether from any custom not admitted by the seller, I think he fails upon the merits, and I prefer to decide upon that ground. I think he has no equity and no grievance and that his effort to impugn the arbitrators' jurisdiction comes to nothing. I find against him on the third issue, and his other difficulties need not be discussed.

I sustain the objection taken by Sir Benode Mitter at the con-

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clusion of the plaintiff's case. I hold that there is no case to answer, and I dismiss the action with costs.

Against this decision, the plaintiff appealed.

Messrs. Pugh, S. N. Banerjee and *N. Sircar* for the Appellant.

Sir B. C. Mitter, Messrs. A. N. Chowdhuri, S. N. Bose and *K. C. Bose* for the Respondent.

The judgments of the Court were as follows :

Mookerjee, J.: This is an appeal by the plaintiff in a suit to restrain two arbitration proceedings pending before the Tribunal of Arbitration of The Bengal Chamber of Commerce. By a contract, dated the 1st December, 1917, made on the ordinary form of the Indian Jute Manufacture's Association, the plaintiff agreed to sell to the defendant three lacs of yards of Hessian Cloth. The terms which require consideration in this effect were three :—

"Delivery of the said goods to be given and taken as follows : December, 1917.

Each month's delivery to be treated as a distinct and separate contract.

Any dispute whatsoever arising on or out of this contract shall be referred to arbitration under the rules of the Bengal Chamber of Commerce, applicable for the time being, for decision, and such decision shall be accepted as final and binding on both parties to this contract. The award may at the instance of either party and without any notice to the other of them, be made a rule of the High Court of Judicature at Fort William."

These three terms are all part of the printed form with the exception of the words 'December, 1917,' at the end of the first. Of the three lacs of yards contracted for, one-half lac was duly delivered and may now be ignored. No delivery was in fact made of any part of the remainder, which divides itself into three separate lots. As regards the first lot of 50,000 yards which was not delivered, on the 28th February, 1918, the defendant demanded arbitration by the Bengal Chamber of Commerce and proceedings were confined to this particular claim. On the 25th July, 1918, on this portion of the claim an award was made by the Board in favour of the plaintiff with costs and interest. Subsequently, on the 9th April, 1918, and the 21st June, 1918, two other arbitration proceedings were started by the buyer and the object of the present suit is to stay these proceedings before the Chamber of Commerce. Mr. Justice Rankin has held that there is no foundation for the claim. In our opinion, this conclusion is so manifestly right, on the terms

of the contract itself, that it is not necessary to elaborate the matter.

The clause which opens with the words '*any disputs whatsoever* arising on or out of this contract shall be referred to arbitration' obviously means that *each and every dispute* as it arises, on or out of this contract, shall be referred to the arbitration of the Bengal Chamber of Commerce. As each month's delivery was to be treated as a distinct and separate contract, the defendant properly obtained an award as regards the first portion of his claim; this clearly does not prevent him from proceeding with arbitration in respect of matters arising out of subsequent breaches of contract. We agree with Mr. Justice Rankin that as in the present case there were several and separate contracts, there is no foundation for the contention that the right conferred by the arbitration clause was fully exhausted as soon as a complete award was made upon the first reference. We may add that the decision of the House of Lords in the case of *Chandanmul* v. *Donald Campbells and others*(1) shows that there may be successive awards even in the same matter. There, a dispute arose as to the effect of the award on the first arbitration; for the settlement of this dispute, a second reference to arbitration was made; it was ruled that such second arbitration was valid.

There is thus no substance in the appeal, which must be dismissed with costs.

Fletcher, J.—I agree.

Messrs Pugh & Co.: Attorneys for the Appellant.

Mr. N. C. Bose: Attorney for the Respondent.

A. T. M. *Appeal dismissed.*

(1) (1916) 23 C. W. N. 707 foot note.

FULL BENCH.

Before Sir Lancelot Sanderson, Knight, Chief Justice, Sir Asutosh Mookerjee, Knight, Judge, Sir Ernest Edward Fletcher Knight, Judge, Sir Asutosh Chaudhuri, Knight, Judge, and Mr. Justice Walmsley.

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v.

PANCHU DAS AND ANOTHER.*

Evidence, admissibility of—Evidence Act (I of 1872), Secs. 9, 11, 14, 15, 167—Accused, identity of—Association—Letters Patent, cls. (25) and (26)—Procedure—Jury trial—Reasonable certainty—Right to begin—Evidence of motive, if admissible—Criminal acts other than those covered by indictment, if admissible—Acts connected together—Evidence of collateral facts—Admissibility of evidence depends on what—Evidence of general disposition, habit and tendencies, if admissible—Evidence, admissibility of, by what law to be determined.

A and B were charged with theft committed in 1914, in the house of a prostitute; evidence was brought forward to show that C and D committed a theft in the house of another prostitute in 1918 in somewhat similar circumstances:

Held (*Chaudhuri, J.* dissenting), that the evidence was not admissible either under section 9 or under section 11 of the Indian Evidence Act to prove that A and B were the same persons as C and D.

Facts to establish that A and B had "hunted in couples," and, in several instances, taken part in thefts from rich prostitutes, that is, a series of incidents from 1914 to 1918 to establish that they have lived together and had transactions together, that a system had been followed by them, that they used to go about together under different names and had associated together with an evil motive, namely, the commission of thefts from rich prostitutes, were sought to be given in evidence:

Held (*Chaudhuri, J.* dissenting) that such evidence was not admissible either under section 14 or under section 15 of the Evidence Act.

(*Chaudhuri, J.* doubting) under clauses 25 and 26 of the Letters Patent, the case reserved or certified should be finally decided on review and not remitted for retrial: *Emperor* v. *Futeh Chand* (1) and *Queen* v. *Hurribole* (2) followed.

(*Chaudhuri, J.* expressing no opinion). It is incumbent on the High Court, in cases reserved or certified, to investigate, whether, independently of the evidence objected to and admitted, there was sufficient evidence to justify the verdict of the Jury. In examining the evidence, the Court must consider, whether it can, with reasonable certainty hold that, even if the evidence improperly admitted had

* Full Bench Reference under clause 25 of the Letters Patent by Mr. Justice Chaudhuri, dated the 4th August, 1919.

(1) (1916) I. L. R. 44 Calc. 477; 24 C. L. J. 400.

(2) (1876) I. L. R. 1 Calc. 207; 25 W. R. Cr. 36.

been excluded, the jury, upon the residue of the evidence, would have brought in a verdict of guilty.

The counsel for the accused has a right to begin and has a right to reply: *R. v. Inhabitants of Gate Pulford* (1) referred to.

Per Mookerjee, J.: The Indian Evidence Act prohibits the employment of any kind of evidence not specially authorised by the Act itself: *Lekraj Kuer* v. *Mahpal Singh* (2) and other cases referred to.

The gist of section 15 of the Indian Evidence Act is that unless there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact, that is, unless there is in substance some common link, they cannot form a series.

Evidence of general disposition, habit and tendencies, is not relevant.

Evidence of collateral offence cannot be received as substantive evidence of the offence on trial, though under section 14 of the Evidence Act, evidence may be given of intention and like matters where the factum of such intention or like matters is relevant.

The admissibility, not merely the weight, of the evidence depends upon the evidence of such conduct as would authorise a reasonable influence of a systematic pursuit of the same criminal object: *R. v. Bond* (3) followed.

The Judicial Committee did not, by their decision in *Subrahmaniya* v. *King Emperor* (4) overrule by implication the series of cases in Calcutta and Bombay where the High Court had, in cases reserved or certified, reviewed the evidence and determined the question of guilt of the accused. The decision of the Judicial Committee must be limited to cases of the type then before them, namely, where the trial had been conducted in a mode entirely prohibited by law, and cannot be extended to cases where evidence had been erroneously received or improperly rejected.

Per Chaudhuri, J.: It is wrong to say that section 15 of the Indian Evidence Act only deals with intention as opposed to accident.

Evidence tending to show that the accused have been guilty of criminal acts other than those covered by the indictment is not admissible, unless upon the issue whether the acts charged against the accused were designed or accidental or unless to rebut a defence otherwise open to them: *Makin* v. *Attorney General* (5) and *R* v. *Wyatt* (6) referred to.

It is the general rule of law to admit evidence of motive. Evidence is admissible of any acts or doing of the person accused if such acts or doing are so connected with the transaction under charge or are of a character so similar thereto as to lead to a reasonable inference that the prisoner committed the act charged.

The two accused were charged under sections 320, 320/114 120B, 380/114 Indian Penal Code. They were tried before Mr. Justice

(1) (1856) Dearsly and Bell 74 (94); 7 Cox. 230.
(2) (1879) L. R. 7 I. A. 63 (70); I. L. R. 5 Calc. 744.
(3) (1906) 2 K. B. 389 (405).
(4) (1901) I. L. R. 25 Mad. 61; L. R. 28; I. A. 357.
(5) (1894) A. C. 57. (6) (1914) A. C. 57.

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Chaudhuri and a special jury. The jury by a majority of seven against two found both the accused guilty of murder, conspiracy and theft; their verdict was not taken in respect of the charges of abatement. Mr. Justice Chaudhuri thereupon sentenced each accused to transportation for life under section 302 and to rigorous imprisonment for five years under each of the other sections, the sentences to run concurrently. But as objection had been taken to the admissibility of certain evidence, the learned Judge reserved the point under clause 25 of the Letters Patent, for consideration of the Court. The learned Judge accordingly made the following

Reference.

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August, 4.

Chaudhuri, J.: The abovenamed Panchu Das and Gobordhone Das said to have several aliases, hereinafter referred to as accused No. 1 and and No. 2 respectively, were tried before me and a Special Jury for the offences of murdering one Dako Bewa, a woman of the town, on the 10th December, 1914, of conspiring to rob her, of theft of property from her house and for abetment of the offences of murder and theft under sections 302, 302/114, 120B, 380/114, Indian Penal Code. A copy of the indictment is sent herewith. The majority of the Jury, 7 to 2, found both the accused guilty under sections 302, 120B and 380, Indian Penal Code. Their verdict was not taken in respect of the charges of abetment. I have sentenced each of them to transportation for life under section 302 and to 5 years' Rigorous Imprisonment under each of the other sections to run concurrently, but have suspended the operation of the sentence pending the decision of the Court having regard to the points reserved, directing them to be kept in custody as undertrial prisoners.

The case for the prosecution is that the woman Dako was in the keeping of one Gopal Chandra Das, but he left in Aswin (September/October) 1914. In the following month of Aghran. (November/December) 1914, accused No. 1 became her paramour introducing himself as a Raja's son or a Zamindar's son. A few days after he began visiting her, accused No. 2 began coming with him and was introduced as his Durwan. The woman lived in a two-storeyed house, 29, Premchand Bural's Street and was reputed to be rich. When the first accused came three other women lived in the house as Dako's tenants, Lila, Annoda and Manoda. He is said to have asked Dako to turn out these tenants promising to compensate her; Lila left but Annoda and Manoda failing to find accommodation elsewhere remained, although they complained about a new order

said to have been issued by Dako at the instance of the first accused about locking the outer door from inside at midnight. This began to be done by the second accused. Both the accused used to come to the house at 10-30 or 11 at night. They lived upstairs. The first accused slept in the same room with Dako and the second in a room close by. No other persons lived in the upper floor. Dako did not receive any other men after accused No. 1 began coming. Accused No. 2 used to leave the house early in the morning and accused No. 1 between 8 and 10 A.M. The rooms in the ground floor were occupied at this time by Annoda and Manoda. Annoda's room was shared by her mother Kumudini at night and her paramour Panchu Koera also used to sleep there every night, but he used to go to his work in the morning. On the 9th December, 1914, accused Nos. 1 and 2 came as usual at about 10-30 or 11 P.M. Manoda, Annoda, Panchu Keora and Kumudini saw them coming. The outer door was thereafter locked up from inside by accused No. 2 at midnight. The accused and Dako were the only people upstairs that night and the others remained in the ground floor. Next morning Manoda found the outer door open but the padlock was seen by her hanging from the ring attached to it and Dako's room was found by her with two padlocks, one attached to the chain securing the door to the door frame and the other to rings in the middle. This was unusual and she called up Annoda. They thought that Dako might have gone to her landlord's house. They and Panchu searched for her there and at other places and not finding her eventually informed the Police that afternoon, the informant being Panchu Koera. The Police came and opened door and found Dako's dead body covered by a blanket, her head practically completely severed from the body, all her boxes open, ornaments, clothes, everything gone, except a pair of earrings in her ears. Abdul Gunny, Sub-Inspector, took up the enquiry, examined the inmates of the house and other people, but found no trace of accused 1 and 2. The enquiry was dropped in July, 1915.

Accused No. 2 was arrested in December, 1918, by Inspector Mohendra Nath Mukherjee in connection with a complaint of theft against two persons, a Babu and a Durwan, made by a woman of the town named Shamasundari. He took up that enquiry on the 19th November, and came across another woman of the town named Niroda who also made a similar complaint against two persons, a Babu and a Durwan. The former gave the names as Narain and Mahabir Pandey and the latter Birendra Babu and Durwan. The description of their appearance is said to have tallied. During his

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enquiries the Inspector next came across another woman of the town, named Sindhubala who had a similar complaint. She had instituted criminal proceedings in September, 1915, but the accused having absconded after arrest and bail and no one appearing that case was struck off in December, 1915. The Inspector obtained a photograph of the person she had charged, Ex. 33, from Sindhubala and showed it to Niroda and Shamasundari. Both of them identified it as that of the Babu they had complained against and who they said used to visit them. From some other information he caused a house No. 6, Peara Bagan where he was told accused No. 2 lived, to be watched and searched it and came across amongst other things a silver *tora* (ankle ornament) and a silver *goit* (waist chain) in a box in one of the rooms and a letter Ex. 8 and a post-card Ex. 9. Eventually he arrested accused No. 2 on the 29th December, 1918, in the house of a pleader named Debendra Nath Das.

In the course of the above enquiry the Inspector received some information from a Head Constable named Ramadhar Pande who had something to do with the enquiry into the case of Dako's murder. He found out the addresses of Manoda and Annoda and showed them the photograph (Ex. 33) on the 9th of January, 1919, who identified it as that of the Babu who used to come to Dako in December, 1914, and had come there on the night of the murder. The enquiries continued. In the meantime Niroda received some information from one Monindra Mullick about the Babu she had charged, and found him in Sovabazar in another prostitute's house. She caught hold of him with the assistance of Monindra and made him over to the inspector. This was on the 11th March, 1919. The accused made a statement and pointed out a particular room in 5, Patuatola Lane. He opened a box in which a shawl was found (Item 11 in the Search List and also a decree Ex. 19 obtained by Goberdhone against a woman named Kiranbala). It transpired during these enquiries that the name of accused No. 1 was Panchu and of accused No. 2, Goberdhone; that accused No. 1 was not a Babu, or a zemindar, but had been a menial servant in the service of one Pulin Behary Sen five years ago and of one Provas Chandra Roy about the middle of 1917 of which evidence has been given. Evidence has also been given that accused No. 1 and No. 2 at one time lived together in the house of one Surjomoni Bariwali in Basti No. 19 in Goabagan Lane and one Gunput has given evidence that the accused lived together at Peara Bagan for four or five years. This evidence was unchallenged.

At the trial before me, the accused were identified by Manoda, Annoda and Panchu as the Babu and Durwan, and accused No. 1 was also identified by one Profulla, a doctor, who attended on Dako and one Giribala, a neighbouring prostitute, as the Babu who was introduced to them by Dakkho as the person in whose keeping she was shortly before her death.

The silver *tora* and *gota* were identified by Manoda, Annoda and Giribala as belonging to Dako and also by Gopal Chandra Das, the discarded paramour, and Goracband Roy, Dako's silversmith. The shawl was also identified as belonging to Dako by Manoda, Annoda and Gopal.

After the Jury was empanelled, the learned Standing Counsel wanted my direction about opening certain evidence which he desired to give as part of his case. I asked the Jury to retire and he submitted that it was open to him to give evidence on the following points, viz :—

(1) How the two accused were discovered ?

(2) That they had "hunted in couples" and in several instances taken part in thefts from rich prostitutes, a series of incidents from 1914 to 1918 that they had lived together and had transactions together : that a system had been followed by them ; that they used to go about together under different names and they had associated together with an evil motive, namely that of committing theft from rich prostitutes.

His case was that the two accused had conspired to rob Dako, that the motive for their coming to her house was commitment of theft and he submitted it was open to him to prove their identity and subsequent complaints of thefts made by other prostitutes.

He submitted that although evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, it was admissible upon the issue whether the acts charged against the accused were designed or accidental and to rebut any other defence otherwise open to them, namely amongst other things that they did not know each other, but had met in the woman's house by accident. He submitted that he was entitled to give evidence to rebut the defence of innocent association. He relied upon *John Makin* v. *The Attorney-General* (1) ; *Re George Joseph Smith* (2) ; *R.* v. *Bond* (3) ; *R.* v. *Thompson* (4) ; *Amrita Lal Hazra* v. *Emperor* (5), and upon sections 14 and 15, Evidence

(1) (1894) A. C. 57. (2) (1915) 11 Cr. App. Rep. 229.
(3) (1906) 2 K. B. 389.
(4) (1917) 2 K. B. 630 ; affirmed on H. L. (1918) A. C. 221.
(5) (1915) I. L. R. 42 Calc 957 ; 21 C. L. J. 331.

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Act, his contention being that the law in England was not different from that in India. *Empress* v. *M. J. Vyapoory Moodeliar* (1), was also referred to and discussed.

The learned Counsel who appeared for the accused separately submitted that such evidence was not admissible under Secs. 14 and 15, Evidence Act, the only sections which had been referred to and they relied upon illustrations (i), (j), (o) and "(p)" of section 14 and also on, *Emperor* v. *Abdul Wahid Khan* (2), *Reg.* v. *Parbhudas Ambaram and others* (3), and *Bakaruddin Mandal* v. *Emperor* (4). As I understood them they conceded that evidence could be given that the accused had given different names but maintained that under no circumstances could evidence of subsequent complaints as foreshadowed be given nor any evidence of association. They did not indicate what their defence was going to be. I held that the learned Standing Counsel could open his case generally indicating the nature of it without specifying any instances of subsequent complaints. I held that the facts relating to the indictment should be proved in the first instance and after that if he desired to give specific evidence of the matters he had indicated, that is to say, to show identity, design and evil association, objection was to be formally taken when it was tendered and my ruling taken upon it.

As some of the questions raised were not covered by any direct Indian authority, I said I would reserve them if necessary. After the evidence relating to the murder of Dakkho and theft in her house was given, namely that of Annoda, Manoda, Panchu Keora, Profulla Doctor, Giribala, Gopal Chandra Das and Gora Chand Roy and certain other witnesses who were tendered for cross-examination but were not examined-in-chief, Shamasundari was called. The whole of her evidence was objected to, as also that of Niroda and Sindhubala, Monindra, Kiransashi and Beni Madhab Mitter.

The evidence of Inspector Mohendra Nath Mukherjee so far as it is connected with their evidence was also objected to. The evidence of the woman above referred to, namely Shamashundari, Niroda and Sindhubala is practically of the same nature, namely that accused No. 1 introduced himself as a Babu and accused No. 2 was brought in by him as his Durwan that the woman was in the keeping of accused No. 1 for some time. That one day they suddenly disappeared and the woman discovered money and ornaments missing and a complaint was made to the Police. In the case of Sindhubala she and the first accused had taken photographs,

(1) (1881) I. L. R. 6 Calc. 655.
(2) (1911) I. L. R. 34 All. 93.
(3) (1874) 11 Bom. H. C. R. 90.
(4) (1913) 18 C. L. J. 378.

the two together, and some of these photographs were found in a box belonging to the accused which was opened by him after his arrest at the search of his premises. She also proved the handwriting of accused No. 1 in Exs. 8 and 9 found in the house of accused No. 2. Shamasundari identified certain ornaments and a watch which were found in the search of Gobordhone's house. Kiransashi and Beni Madhab proved that money was borrowed from accused No. 2, but that accused No. 1 came and demanded payment as the money, he said, belonged to him. Copy of the decree of a Small Cause Court suit, *Gobordhone* v. *Kiranbala*, was found in the box accused No. 1. The evidence of Surjomoni Bariwali, Gunput, Probhas Chandra Roy and Pulin Behary Sen were not objected to.

The line of defence was practically a complete denial. It was not indicated that the accused knew each other or were associated in any way whatsoever, but when Surjomoni Bariwali and Gunpat were examined, their evidence namely that they had lived together was not objected to nor were they cross-examined. In this connection I think I should call attention to two little bits of cross-examination.

Mr. Bose on behalf of accused No. 2 asked Manoda.

"Will you tell me whether it is a fact or not that three people Pada, Gosta and Mankey had a drinking bout in the Bariwalli's room up to 2 o'clock that night of murder and had a quarrel over a ring?—No, not that night." This is noticeable having regard to the general trend of the cross-examination.

The other was by Mr. Sen Gupta, when Shamasundari was in the witness-box. She had said accused No. 1 and she had gone to Tarakeswar. He quarrelled with her and left her there. When she came back to Calcutta she found her things gone, and accused No. 2 who was left in charge was nowhere. The questions and answers were:

"Say, yes or no. Did'nt that man whom you call Noren Babu come back at 2 o'clock in the morning again after the quarrel?"—Yes.

"Yes or no, you refused to open the door and let him in?"—That is so.

"You arrived in Calcutta that morning at about 9 or 10 o'clock?"—Yes, at about 10 o'clock.

Attention is also called to the statement made by the accused when I examined them, the copy of which is annexed herewith. The accused did not call any evidence.

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The questions I reserve for the decision of the Court relate to the admission of the evidence abovenoted which was objected to, namely :

(1) Evidence of association of the two accused, (2) Evidence of their association in the cases spoken to by Shamasundari, Niroda and Sindhubala in connection with the charges of theft which they made against them, (3) Evidence of their association which was given by Kironsashi and Benimadhub Mittra, (4) Admission of Exhibits 8, 9 and 18, (5) Connected evidence with regard to the discovery of their documents, (6) Evidence that they went together to the houses of prostitutes, accused introducing himself as a Babu taking the second accused with him as his Durwan their subsequent disappearance and discovery and loss of money and ornaments.

I think the above evidence was rightly admitted to show identity, design and motive and illegal association that a system had been pursued by them.

Should the Court take the same view the conviction is to be upheld if not such other order should be made as justice may require.

I may add that in charging the Jury, I first dealt with the evidence relating to the murder of Dako and the theft from her house—keeping that entirely separate from the other evidence and told them that the case so far as those offences were concerned practically entirely depended upon that evidence. It was for them to say whether upon that evidence they were satisfied about the identification of the accused and of the silver ornaments and shawl said to have been belonged to Dako. Shamasundari, Niroda and Sindhubala had also identified the same two persons but that was a different matter. I then explained the charge under section 120B fully and dealt with the abetment sections and explained the meaning of conspiracy. I guarded against the likelihood of confusion and told them why the evidence of the other women relating to the subsequent acts had been tendered and the objections to its admission and the difficulty of drawing the line of demarcation, between what was admissible and what was not, that the complaints by those women were pending judicial determination, that they were merely allegations and that their evidentiary value was not to be exaggerated specially as the line of demarcation was a difficult one, and that I was reserving the point for the consideration of the Court. That having regard to that fact it would not be improper for them to attach but little value to that part of the case. I also said that the learned Counsel had urged that there was likelihood of prejudice

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being created against the accused far in excess of the evidentiary value of such incidents, as had been sought to be proved by the evidence of the three women Shamasundari, Niroda and Sindhubala, that the matter was worthy of consideration and they should endeavour to arrive at a decision in respect of the charges keeping their minds free from any bias or prejudice. It was only right for them and it was their duty to give the accused the benefit of any doubt they might entertain so long as the doubt was reasonable and not capricious.

Having regard to the fact that I was going to reserve the points, I directed the evidence to be taken down by the shorthand officers of the Court. Both sides had copies and they stated to me that the evidence taken down was entirely correct and they also agreed with my notes. They are sent herewith and should be treated as part of the record.

I read the above note to Counsel on both sides and they said that their contentions and submissions had been fully and correctly set out.

The Reference then came on for hearing before the Full Bench.

At the commencement of the hearing a question arose as to who should begin. It was ruled by the Court that the Counsel for the accused should begin.

Mr. J. N. Sen Gupta (with him *Mr. S. C. Basu*) for the Accused.

Mr. S. R. Das for the Crown.

C. A. V.

The following judgments were delivered :

February, 10.

Sanderson, C. J. :—Panchu Das and Gobordhone Singh were convicted by the majority of the Jury, 7 to 2, at a trial at the Criminal Sessions presided over by Chaudhuri, J., of offences under sections 302, 120B, and 380 Indian Penal Code.

The indictment contained 7 counts : and included charges of murdering one Dako Bewa, a woman of the town on the 10th December, 1914, conspiring to rob her, theft of property from her house, and abetment of the offences of murder and theft.

The learned Judge admitted certain evidence which was objected to by learned Counsel representing the accused persons but intimated that as the questions were not covered by any direct Indian authority he would, if necessary, reserve them for the consideration of the Court. This reference accordingly was made by the learned Judge. The case for the prosecution is set out by the learned Judge in the reference, and need not be repeated in detail by me.

An important feature of the prosecution case was that the 1st accused introduced himself to the deceased woman as a Raja's son

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or a Zemindar's son and a few days after the first accused began visiting the deceased, woman, the second accused began coming with him and was introduced as his Durwan. The allegation was that, on the night of 9th December or morning of 10th December, 1914 the two accused murdered the deceased woman, or that one of them murdered her and the other abetted the murder and that they robbed her of practically all she possessed and decamped. Enquiries were made by the Police, but without getting any trace of the alleged murderers and the enquiries were dropped in July 1915. The 2nd accused was arrested in December, 1918, in connection with a complaint of theft made by a woman of the town, Shama Sundari, against two persons described as a Babu and a Durwan. In the course of enquiries the Police came across another woman, Niroda, who made a similar complaint against two persons, a Babu and a Durwan.

The Police on further enquiries being made came across a third woman, Sindhubala, who made a similar complaint of theft against two persons.

The Inspector of Police obtained a photograph from Sindhubala of one of the persons, whom she charged: he showed it to Niroda and Shama Sundari both of whom identified it as that of the Babu against whom they complained.

In the course of his enquiries the Inspector of Police got certain information from a Head Constable who had something to do with the enquiry into the murder of Dako.

He obtained the addresses of Niroda and Annoda, who are two of the women who lived on the ground floor of Dako, the murdered woman's house, and on the 9th January, 1919 he showed them the photograph. They identified it as that of the Babu who used to visit Dako in December, 1914, and who was with her on the night of the murder.

On the 11th March, 1919, the 1st accused was arrested.

The murder was on the 10th December, 1914, Sindhubala's charge related to events of September, 1916, Niroda's was February or March, 1918, and Shamasundari's October, November, 1918.

It was mainly in relation to part of the evidence of the three women, Sindhubala, Niroda and Shamasundari and part of the evidence of Inspector M. N. Mukherjee that this reference was made.

The grounds on which the evidence was said to be admissible are contained in the reference and set out at pages 278 and 279 of the paper book as follows:—

(1) How the two accused were disco vered,

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(2) That they had "hunted in couples" and in several instances taken part in thefts from rich prostitutes, a series of incidents from 1914 to 1918, that they had lived together and had transactions together; that a system had been followed by them; that they used to go about together under different names and they had associated together with an evil motive, namely that of committing theft from rich prostitutes.

The learned standing counsel submitted that his case was that the two accused had conspired to rob Dako, that the motives for their coming to her house was commitment of theft and he submitted it was open to him to prove their identity and subsequent complaints of thefts made by other prostitutes.

He submitted that although evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment was not admissible, it was admissible upon the issue whether the acts charged against the accused were designed or accidental and to rebut any other defence otherwise open to them, namely amongst other things that they did not know each other, but had met in the woman's house by accident. He submitted that he was entitled to give evidence to rebut the defence of innocent association.

The nature of the evidence may be taken from that of Shama Sundari, which is, referred to in the reference, viz., that accused No. 1 introduced himself as a Babu and accused No. 2 was brought in by him as his Durwan, that she was in the keeping of accused No. 1. That one day they disappeared and the woman discovered money and ornaments missing.

The learned Judge admitted the evidence as showing identity, design and motive, and illegal association and that a system had been pursued by them.

It was first argued that the evidence of the three abovenamed women was admissible under section 15 of the Evidence Act. In my judgment this argument should not be acceded to. In this case there was no question of the act being accidental or intentional.

The woman was undoubtedly murdered in a brutal way: her head was practically severed from her body: the deceased woman's room had been rifled and practically everything she possessed both in her room or on her person had been stolen. There was no room for any doubt that the acts with which the accused were charged, were intentional. The only real question was who was the person or who were the persons who committed the crime.

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Next it was urged that section 14 of the Evidence Act applied. In my judgment this section does not apply. There was nothing in the evidence of the three women to show the state of mind of the accused towards Dako, or with reference to the particular matter in question. The learned standing counsel for the crown then referred to sections 9 and 11 (2) of the Evidence Act and argued that the evidence of the three abovementioned women was admissible to prove the identify of the two persons who were in Dako's house on the first floor on the night of the murder.

In this connection, in my judgment, the dates are material. As already mentioned the murder was in December, 1914. The first incident, in respect of which the evidence which was objected to, related, was in September, 1916, viz., Sindhubala's charge, nearly two years after the murder and the other two women's evidence related to 1918.

In this case the main charge was one of murder : it was admitted by the learned standing Counsel that the evidence of the three abovementioned women, which was objected to, could not be material to that charge as the evidence of the three women related to charges of theft only : but it was contended that it was admissible to show that the persons, who robbed the three abovementioned women, were the persons, who committed the theft on the 10th December, 1914.

It was alleged that in each case the offenders passed themselves off as a Babu and a Durwan, and that in each case the complainant was a woman of the town who was visited by the alleged Babu and that consequently it was highly probable that these two men were the same as those, who were living in Dako's house at the time of the murder. Having regard however to the dates of the incidents alleged by the three abovementioned women, and the nature of their evidence, in my judgment it was not admissible under section 9 or under section 11 of the Indian Evidence Act.

There was other evidence to which objection was taken, but in view of the opinion which I hold as to the evidence already dealt with, it is not necessary for me to consider the other evidence.

During the course of the argument we intimated to the learned Counsel that we had come to the conclusion that some of the evidence was improperly admitted ; and the question then arose as to whether this Court could order a new trial, which in this case would have been the most desirable course. The learned Standing Counsel however, submitted that we had no power to direct a new trial,

in which submission the learned Counsel for the convicted men concurred.

In view of the decision of this Court in *The Queen* v. *Hurribole Chunder Ghose* (1), and *Emperor* v. *F. C. Agarwalla* (2). I am bound to hold that on this reference it is not open to us to direct a new trial. The merits of the case were then argued and the learned Standing Counsel submitted that we should uphold the conviction in view of the evidence, as to which there was no question, and excluding the evidence to which objection was taken.

In my judgment the convictions should not be upheld. The accused persons were entitled to be tried by a jury: They were in fact tried by a Jury: the Jury were not unanimous; the nature of the evidence, which I have referred to and which I consider was wrongly admitted, is such that in my judgment it is impossible to say that the verdict of the majority of the jury may not have been affected by it.

There is evidence, to which no objection has been raised, as to the identity of the accused persons as being the two men who were in the deceased woman's house on the night of the murder: as for instance the evidence of Annoda, Manoda Keora and P. C. Pal. Criticisms have been made on the evidence of the witnesses by the learned Counsel for the accused, as for instance, there the method of obtaining the identification of the photograph by the women Annoda and Manoda was not satisfactory: The evidence of P. C. Pal, who was described by the learned Standing Counsel as the best witness as to the identity of the first accused, has been criticised as being unreliable: it was not suggested that P. C. Pal was not speaking the truth to the best of his recollection, but it was pointed out that he saw the first accused on two occasions only, some 4 years before he gave evidence; that he did not recognize the photograph, when it was shown to him, as that of the first accused, and when the first accused was brought in a gharry to P. C. Pal's house, even then he did not at first recognize him.

I have considered the evidence of the witnesses to which no objection has been raised. I have not seen these witnesses, but only the written record of their evidence: the jury did see the evidence, and their demeanour in the witness box: The majority may have believed these witnesses, and may not have been influenced by the evidence of the witnesses, which was in my judgment improperly admitted.

(1) (1876) I. L. R. 1 Calc. 207. (2) (1916) I. L. R. 44 Calc. 477 (489).

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But on the other hand in this case the charges of murder and theft were tried together and the evidence, which in my judgment was improperly admitted, was of such a nature that it is possible that it may have had considerable influence upon the minds of the majority of the jury who were in favour of a conviction. In this case, in my judgment, it is not possible to say with reasonable certainty that the majority of the jury would have accepted and acted upon the evidence as to identity, to which no objection was taken, if the evidence, which in my judgment was improperly admitted, had not also been presented to them. In my judgment therefore the convictions of Panchu Dass and Gobardhone Singh should be set aside.

In this case, in view of the admission of the learned Standing Counsel that the evidence, which was objected to, was not admissible on the charge of murder, it would have been desirable to try the charge of murder separately.

Mookerjee, J.—The facts necessary for the determination of the questions which arise on this reference under clause 25 of the Letters Patent lie in a narrow compass and may be briefly recited. On the night of the 10th December, 1914, Dakha Bewa, a woman of the town who lived at 29, Premchand Boral Street in this city, was murdered. There was an inquest before the Coroner, when the Jurors held that her death had been caused by decapitation by some person unknown under such circumstances that the act amounted to murder. The Police held an enquiry which proved fruitless and was dropped as the culprits could not be traced. On the 29th December, 1918, the second accused was arrested in the course of an enquiry by the police in another matter, and the first accused was similarly arrested on the 11th March, 1919. Acting on information received and on statements alleged to have been made by the first accused, the Police discovered in the possession of the accused a shawl and ornaments said to have belonged to the murdered woman. The case was heard by the Chief Presidency Magistrate and the accused were committed to take their trial before this Court in connection with the murder of the deceased woman. They were tried before Mr. Justice Chaudhuri and a Special Jury on the following charges, namely, (1) that the accused had committed an offence under section 120B, Indian Penal Code as they had conspired to rob the woman; (2) that the accused had committed an offence under section 302 Indian Penal Code as they had murdered the woman; (3) that the first accused had committed the murder and the second accused had abetted the offence;

(4) that the second accused had committed the murder and the first accused had abetted the offence, (5) that the two accused had committed theft in a building used as a human dwelling; (6) that the first accused had committed theft and the second accused had abetted the offence; and (7) that the second accused had committed theft and the first accused had abetted the offence. The Jury by a majority of seven against two found both the accused guilty of murder, conspiracy and theft; their verdict was not taken in respect of the charges of abetment. Mr. Justice Chaudhuri thereupon sentenced each accused to transportation for life under section 302 and to rigorous imprisonment for five years under each of the other sections, the sentences to run concurrently. But as objection had been taken to the admissibility of certain evidence, the learned Judge reserved the point under Clause 25 of the Letters Patent. For the appreciation of the precise question of admissibility of the evidence, it is essential to state the facts in fuller detail.

The case for the prosecution is that in November or December, 1914, the first accused became the paramour of the woman and introduced himself as the son of a Raja or Zemindar. After a few days, the second accused began to come with the first accused and was introduced as his Durwan. The house where the woman lived was two-storied; she used to occupy the rooms on the first floor; the ground floor rooms had been let out to other women of the town. The two accused used to come to the house at 10-30 or 11 at night and lived upstairs. The first accused slept in the same room with the woman, while the second used to occupy an adjoining room. No other persons lived in the upper floor. After the first accused began to visit her, she tried to turn out the tenants, one of whom actually left; she also issued an order that outer door of the house must be locked from inside at midnight. On the 9th December, 1914, the two accused came as usual in the evening at about 10-30 or 11, and the outer door was thereafter locked up from inside by the second accused at midnight. Next morning, the outer door was found open, but the room of the deceased woman was padlocked. This was unusual: but the other women in the house thought that Dakha might have gone to see the landlord. A search was made for her in the house of the landlord and also in the bathing platforms on the river bank; but as no trace could be found, the police was eventually informed by the paramour of one of the other women in the house. The police came in the afternoon, forced open the door of her room, found the women dead, her body covered with a blanket and her head practically completely severed from the body.

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All her boxes were open, and the ornaments and clothes were gone, except a pair of ear-rings in her ears. At the trial before this Court, evidence was adduced to prove these allegations; but on behalf of the Crown, leave was obtained to give evidence also on the following points, namely, (1) the circumstances which led to the discovery and arrest of the two accused: and (2) facts to establish that the two accused had, as it was put, "hunted in couples," and, in several instances, taken part in thefts from rich prostitutes, that is, a series of incidents from 1914 to 1918 were proved to establish that they had lived together and had transactions together, that a system had been followed by them, that they used to go about together under different names and had associated together with an evil motive, namely, the commission of thefts from rich prostitutes. On behalf of the accused, objection was taken that such evidence was not admissible under the provisions of the Indian Evidence Act. The objection was overruled, and, besides evidence of association, evidence was permitted to be given to show that the two accused went together to the houses of prostitutes, the first introducing himself as a Babu and taking the second with him as his Durwan, that they subsequently disappeared and this was followed by the discovery of loss of money and ornaments by the women concerned. The substantial point for determination is, whether evidence of this description was admissible to prove the guilt of the accused.

At the commencement of the hearing before us, a question of procedure was raised. We ruled that the Counsel for the prisoner should begin. This is in accordance with the decision in *R.* v. *Inhabitants of Gate Fulford* (1), where the Court for the consideration of Crown Cases Reserved, ruled that Counsel for the prisoner begins (and has a reply), "that being the invariable practice of the Court."

It is necessary to premise that the question of admissibility of the evidence must be determined with reference to the provisions of the Indian Evidence Act. This is manifest from the Preamble and from the provisions of sections 2 and 5. In the case of *Lekraj Koer* v. *Mahpal Singh* (2), the Judicial Committee observed as follows:

"The Indian Evidence Act has repealed all rules of evidence not contained in any Statute or Regulation and the plaintiff must therefore show that these papers are admissible under some provision of the Indian Evidence Act."

Equally explicit is the observation of Jackson J. in the case of

(1) (1856 Dearsly & Bell 74 (94); 7 Cox. 230.
(2) (1879) L. R. 7 I. A. 65 (70); I. L. R. 5 Calc. 744.

Empress v. *Asutosh Chakrabarti* (1), which was heard by a Full Bench.

"In considering such questions as these, it appears to me that embarrassment and difficulty will be greatly lessened, if, instead of assuming the English law of evidence and then enquiring what changes the Evidence Act has made in it, we regard, as I think we are bound to do, the Act itself as containing the scheme of the law, the principles, and the application of these principles to the cases of most frequent occurrence."

The view that the Indian Evidence Act does in effect prohibit the employment of any kind of evidence not specifically authorised by the Act itself has been emphasised in other cases, *R.* v. *Abdullah* (2), *Muhammad* v. *Muhammad* (3), *Collector of Gorakhpur* v. *Palakdhari* (4), *R.* v. *Pitambar* (5). We must consequently examine, under which provision, if any, the evidence was admissible.

Reliance has been placed by the Crown on section 15 which is in these terms :

"Where there is a question, whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant."

This is clearly of no avail. There was no room for any hypothesis that the death of the woman, whoever might have caused it was either accidental or unintentional. The medical evidence makes it incontestable that the act amounted to deliberate murder. No question could consequently arise whether the act was accidental or intentional or was done with a particular knowledge or intention. In so far as the charge of theft was concerned, there was also no question, whether the act was accidental or intentional or was done with a particular knowledge or intention. Further, we cannot overlook that no murder was committed in the three subsequent instances which the three women of the town Shamasundari, Niroda and Sindhubala came forward to narrate. Consequently, the act of murder could not, by any stretch of language, be deemed to form part of a series of similar occurrences. Mr. Das fully appreciated this difficulty and sought to utilise section 15 only in respect of the charge of theft, although he ventured to express the hope that if the evidence was admitted under section 15 for this limited purpose, the

(1) (1878) I. L. R. 4 Calc. 483 (491). (2) (1885) I. L. R. 7 All. 385.
(3) (1888) I. L. R. 10 All. 289. (4) (1889) I. L. R. 12 All. 1.
(5) (1877) I. L. R. 2 Bom. 61.

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Jury would be so influenced thereby that they would, in view of the other circumstances of the case, bring forward a verdict of guilty as well on the charge of murder as on the charge of theft. The Standing Counsel, in other words, wished to achieve by indirect means what he could not possibly attain directly, even upon the most favourable interpretation of section 15. This clearly should not be permissible, and indicates that in the present case, separate trial of the charges of murder and theft was desirable as has been pointed out by the learned Chief Justice at the conclusion of his judgment. There are, however, other difficulties equally insuperable in his way. Section 15 is of no assistance, unless it is established that the act forms part of a *series* of *similar* occurrences. It is well-established that the gist of the section is that unless there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact, that is, unless there is in substance some common link, they cannot form a *series*: There was also the undeniable fact that each of the occurrences had its own special features so that they could not properly be deemed *similar* occurrences.

Reliance was next placed on behalf of the Crown upon section 14 which is in these terms:

"Facts showing the existence of any state of mind such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body of bodily feeling are relevant, when the existence of any such state of mind, or body, or bodily feeling, is in issue or relevant.

Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact."

It is plain that this section is of no assistance. The existence of a state of mind such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards a person or the existence of a state of body or bodily feeling was not and could not be in issue in the circumstances of the case. The defence was a complete denial, and no question of the character contemplated by section 14 did or could possibly arise. The first explanation to the section creates a further difficulty, because the relevant fact proved to show the existence of a relevant state of mind must show that the

state of mind exists, not generally, but in reference to the particular matter in question. The evidence introduced was plainly not of this description. The illustrations (i), (j), (o) and (p) clearly show that the evidence could not be admitted. Reference may particularly be made to the last two illustrations. A is tried for the murder of B by intentionally shooting him dead. The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B; but the fact that A was in the habit of shooting at people with intent to murder them is irrelevant. A is tried for a crime; the fact that he said something indicating an intention to commit that particular crime is relevant: but the fact that he said something indicating a general disposition to commit crimes of that class is irrelevant. These illustrate the elementary principle that evidence of general disposition, habit and tendencies is not relevant.

From the statement of the case by Mr. Justice Chaudhuri it appears that sections 14 and 15 were the only sections which had been referred to, and I have consequently considered, up till now, the question of their true construction. Upon a plain reading of these sections, I feel no doubt that they do not make the evidence admissible. This conclusion is supported by the decisions in *Empress* v. *Moolleliar* (1); *Bahadruddin Mandal* v. *Emperor* (2), and *Emperor* v. *Abdul Wahid Khan* (3). In the first of these cases, Sir Richard Garth, C. J. pointed out that section 14 applies to that class of cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, and added that the Court must be very careful not to extend the operation of the section to other cases where the question of guilt or innocence depends upon actual facts and not upon the state of a man's mind or feeling. Mr. Justice Mitter, if I have read his judgment correctly, did not really dissent from this view. The same line of reasoning was adopted in the second case, where it was ruled that proof cannot be offered of an independent offence to show that, by reason of such independent offence, the accused is more likely to have committed the one for which he is on trial; in other words, evidence of such collateral offence cannot be received as substantive evidence of the offence on trial, though under section 14 evidence may be given of intention and like matters where the factum of such intention of like matters is relevant. The distinction between cases where intention is and cases where intention is not relevant is 'illus-

(1) (1881) I. L. R. 6 Calc. 655.
(2) (1913) 18 C. L. J. 578.
(3) (1911) I. L. R. 34 All. 93.

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trated by the decisions in *Emperor* v. *Debendraprasad* (1), and *Emperor* v. *Abdul Wahid* (2), which lie on opposite sides of the dividing line. Reference may also be made to the decision of West J. in *R.* v. *Parbhudas* (3), where he emphasised the inadmissibility of evidence of one crime (not reduced to legal certainty by a conviction) to prove the existence of another unconnected even though cognate crime. On behalf of the Crown, reliance was however placed upon the decisions in *Makin* v. *Attorney General* (4); *R.* v. *Ball* (5), reversing *R.* v. *Ball* (6); *R.* v. *George Smith* (7); *R.* v. *Bond* (8), and *R.* v. *Thompson* (9), which has been affirmed by the House of Lords in *Thompson* v. *R.* (10). No useful purpose would be served by a detailed analysis of these decisions: most of them, along with other cases, were reviewed by this Court in *Amritlal Hazra* v. *Emperor* (11), where the principles deducible therefrom as to the law administered in England were formulated in the following terms:

"Facts similar to but not part of the same transaction as the main fact, are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts, although in general inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence *aliunde* on these points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent, with respect thereto. In general, whenever it is necessary to rebut, even by anticipation the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different character, and the acts tendered must also have been proximate in point of time to that in question."

I have re-examined these cases and I see no reason to doubt the accuracy of the above statement, which fully accords with the deci-

(1) (1909) I. L. R. 36 Calc. 573.
(2) (1911) I. L. R. 34 All. 93.
(3) (1874) 11 Bom. H. C. R. 90.
(4) (1894) A. C. 57.
(5) (1911) A. C. 47 (52).
(6) (1910) 5 Cr. App. Rep. 238.
(7) (1911) 11 Cr. App. Rep. 229.
(8) (1906) 2 K. B. 389.
(9) (1917) 2 K. B. 630.
(10) (1918) A. C. 221.
(11) (1915) I. L. R. 42 Calc. 957 (997); 21 C. L. J. 331 (355).

sions of the Court of Criminal Appeal in the cases of *R.* v. *Frederick Rodley* (1), and *R.* v. *Arthur Ellis* (2) as also other recent cases, such as *Thompson* v. *R.* (3); *R.* v. *Fisher* (4); *R.* v. *Mason* (5); *R.* v. *Baird* (6); *Perkins* v. *Jeffery* (7). It is plain that the principles so enunciated are of no assistance to the prosecution. On the other hand, there is an important passage in the judgment of Kennedy, J. in the case of *R.* v. *Bond* (8), to which the attention of the Standing Counsel was drawn by the learned Chief Justice in the course of the argument, as destructive of his contention:

"The admissibility, not merely the weight, of the evidence depends upon the evidence of such conduct as would authorise a reasonable inference of a systematic pursuit of the *same* criminal object."

There is thus no escape from the position that neither section 14 nor section 15 of the Indian Evidence Act is of any assistance to the prosecution.

The Standing Counsel was finally constrained to invoke the aid of sections 9 and 11. Reliance was placed upon the rule prescribed by section 9 that facts which establish the identity of anything or person, whose identity is relevant, are relevant in so far as they are necessary for that purpose. This does not advance the argument for the prosecution. No question of identity arises till the offenders who committed the crime under investigation are ascertained by independent evidence. Section 11 is equally unavailing. That section provides that facts not otherwise relevant are relevant, if by themselves or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. As was pointed out by West, J in *R.* v. *Parbhudas* (9), the section is no doubt expressed in terms so extensive that any fact which can by a chain of ratiocination be brought into connection with another so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various and so far-reaching that thus to take the section in its widest admissible sense would be to complicate every trial with a mass of collateral enquiries, limited only by the patience and the means of the parties. That such an extensive meaning was not intended is possibly indi-

(1) (1913) 9 Cr. App. Rep. 69.
(2) (1910) 5 Cr. App. Rep. 41.
(3) (1918) A. C. 221.
(4) (1910) 1 K. B. 149.
(5) 111 L. T. 336.
(6) (1915) 84 L. J. K. B. 1785.
(7) (1915) 2 K. B. 702.
(8) (1906) 2 K. B. 389 (405).
(9) (1874) 11 Bom. H. C. R. 90.

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cated by the fact that the illustrations do not go beyond cases familiar in the English Law of Evidence; *R.* v. *Vaji Rao* (1). A restriction is further obviously imported by the use of the expression highly probable or improbable. In the case before us, what is the substance of the matter? A and B are charged with theft committed in 1914 in the house of a prostitute; evidence is brought forward to show that C and D committed a theft in the house of another prostitute in 1918 in somewhat similar circumstances. I am not prepared to hold that the latter evidence is admissible either under section 9 or under section 11 to prove that A and B are the same persons as C and D. I hold accordingly that sections 9 and 11 are of no greater assistance to the prosecution than sections 14 and 15.

The question next arises, what are the functions of this Court in such circumstances. The answer depends upon the true construction of clauses 25 and 26 of the Letters Patent. The matter was reviewed in my judgment in the case of *Emperor* v. *Fateh Chand* (2). I then came to the conclusion that the obvious intention of the clauses, to be gathered from their plain language, was that the case reserved or certified should be finally decided on review and not remitted for retrial. This was in accord with the view taken in a long line of cases in this Court and elsewhere; *R. Naoroji* (3); *Imperatrix* v. *Pitambar* (4); *Emperor* v. *Narayan* (5); *Queen* v. *Hurribole* (6); *Queen* v. *Okara* (7). Upon a fresh consideration of the subject, I see no reason to resile from the opinion previously expressed by me. This view, it may be added, also accords with the accepted interpretation of section 2 of the Crown Cases Act, 1848, which furnished the model for the provisions of clauses 25 and 26 of our Letters Patent *R.* v. *Saunders* (8); *R.* v. *Gibson* (9); though I am not unmindful that in *R.* v. *Aron Meller* (10), and *R.* v. *Yeadon* (11), the Court for consideration of Crown Cases Reserved, granted a *venire de novo* under very exceptional circumstances which vitiated the trial as conducted in a manner unknown to law. See, however, the decisions of the Judicial Committee in *R.* v.

(1) (1892) I. L. R. 18 Bom. 414.
(2) (1916) I. L. R. 44 Calc. 477; 24 C. L. J. 400.
(3) (1872) 9 Bom. H. C. R. 358. (4) (1877) I. L. R. 2 Bom. 61.
(5) (1907) I. L. R. 32 Bom. 111.
(6) (1876) I. L. R. 4 Calc. 207; 25 W. R. Cr. 36.
(7) (1890) I. L. R. 17 Calc. 642. (8) (1899) 1 Q. B. 490.
(9) (1887) 18 Q. B. D. 537.
(10) (1858) Dearsly & Bell 468; 7 Cox. 464.
(11) (1861) Leigh & Cave 81; 9 Cox. 91.

Bertrand (1) and *R.* v. *Murphy* (2), which dissented from *R.* v. *Scarfe* (3). But, apart from this analogy, I hold, on the plain language of clauses 25 and 26 of the Letters Patent, that the intention was that the case should be finally decided on review and not remitted for retrial.

This leads me on to the next point, namely, can the Court, on review, examine the evidence and determine whether, after exclusion of the inadmissible evidence, the residue is sufficient to justify the conviction. The Standing Counsel has argued that the Court is not merely competent, but is really bound to follow this procedure. On behalf of the accused, it has not been disputed that this contention accords with the numerous decisions previously mentioned, but we have been pressed to hold that they were overruled by implication by the Judicial Committee in the case of *Subramaniya* v. *King Emperor* (4). Reliance has also been placed upon the observations of the Judicial Committee in *Makin* v. *Attorney General* (5), where they emphatically condemned the transference, from the Jury to the Court, of the determination of the question, whether the evidence, that is, what the law regards as evidence, established the guilt of the accused. The question thus raised is not free from difficulty and was left open in the case of *Emperor* v. *Fateh Chand* (6), as the evidence there was manifestly insufficient to support the conviction. In the case before us, the question has been re-argued, and I have arrived at the conclusion that the Judicial Committee did not, by their decision in *Subramaniya* v. *King Emperor* (4), overrule by implication the series of cases in Calcutta, and in Bombay where the High Court had, in cases reserved or certified, reviewed the evidence and determined the question of guilt of the accused. The decision of the Judicial Committee must be limited to cases of the type then before them, namely, where the trial had been conducted in a mode entirely prohibited by law, and cannot be extended to cases where evidence had been erroneously received or improperly rejected. If this view were not adopted, the result would follow that wherever evidence, however trifling its effect, had been erroneously received or excluded, the Court would be constrained to quash the conviction and sentence and set free the accused as no re-trial could be ordered. Such a conclusion would directly contravene the principle enunciated in section 167 of the Indian Evidence Act :

(1) (1867) L. R. 1 P. C. 520. (2) (1869) L. R. 2 P. C. 535.
(3) 17 Q. B. 238.
(4) (1901) I. L. R. 25 Mad. 61 P. C. ; 5 C. W. N. 866 ; L. R. 28 I. A. 357.
(5) (1894) A. C. 57.
(6) (1916) I. L. R. 44 Calc. 477 ; 24 C. L. J. 400.

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"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

This provision, by the very generality of its terms, applies as much to Criminal as to Civil cases: *Queen* v. *Hurribole* (1); *Empress* v. *McGuire* (2); *Queen* v. *Naoroji* (3); *Empress* v. *Ohara* (4); *R.* v. *Pitambar* (5). We must consequently hold that it is incumbent on this Court to investigate, whether, independently of the evidence objected to and admitted, there was sufficient evidence to justify the verdict of the Jury.

When we examine the evidence, we must, as the learned Chief Justice has pointed out, consider, whether we may, with reasonable certainty, hold that, even if the evidence improperly admitted had been excluded, the Jury, upon the residue of the evidence, would have brought in a verdict of guilty. If this standpoint were not adopted, the result would be that in every case where evidence had been wrongly admitted and the question was on that ground brought up for review, the accused would be practically deprived of the benefit of what is called by Lord Herschell L.C., "the much cherished right of trial by Jury in Criminal cases:" *Makin* v. *Attorney-General* (6). The Judges would in truth be substituted for the Jury, the verdict would become theirs and theirs alone and would be arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance afforded thereby. This aspect of the matter was emphasised by Sir John Coleridge in *R.* v. *Bertrand* (7) in impressive language which may be usefully recalled:

"The most careful note must often fail to convey the evidence fully in some of its most important elements—those for which the open oral examination of the witness in presence of prisoner, Judge, and Jury is so justly prized. It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it

(1) (1876) I. L. R. 1 Calc. 207; 25 W. R. Cr. 36.
(2) (1900) 4 C. W. N. 433.
(3) (1872) 9 Bom. H. C. R. 358 (374).
(4) (1890) I. L. R. 17 Calc. 643.
(5) (1877) I. L. R. 2 Bom. 61.
(6) (1894) App. Cas. 57 (70).
(7) (1867) L. R. 1 P. C. 520 (535).

cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment; it is, in short, or, it may be, the dead body of the evidence, without its spirit, which is supplied, when given openly and orally, by the ear and eye of those who receive it."

A grave responsibility consequently rests upon the Court when it is called upon to review the case on the evidence under clause 26 of the Letters Patent read with section 167 of the Indian Evidence Act. The evidence improperly admitted might have chiefly influenced the Jury to return a verdict of guilty, and the rest of the evidence, which might on paper appear to the Court sufficient to support the conviction, might have been reasonably disbelieved by them in view of the demeanour of the witnesses or might have been regarded by them, isolated from the foreign matter improperly introduced, as wholly insufficient to justify an inference of guilt. In such circumstances, the right principle to adopt is to ask ourselves, whether we can feel certain that, on the residue of the evidence, a reasonable jury would have brought in a verdict of guilty: and this is precisely the test formulated by Isaacs L. C. J. in the case of *R.* v. *William Barron* (1). In that case, evidence of a previous accusation of an offence similar to that charged had been improperly given. In an appeal against the conviction, it was held that the evidence was prejudicial to the accused and should not have been admitted. The Lord Chief Justice then added that as "we cannot be certain that the Jury would have found him guilty, if it had not been admitted," the conviction must be quashed. To the same effect are the following observations of Lord Alverstone, C.J. in the case of *R.* v. *James Campbell* (2), where the appeal was allowed and the conviction quashed on the ground that substantial evidence against the defendant had been improperly admitted:

"It is not possible to say that this evidence may not have had a serious effect; it is true there was weighty evidence besides this, but we cannot say that the Jury would have returned the same verdict on that evidence alone."

The same test has been adopted and applied in other cases: *R.* v. *Frederick Rodley* (3); *R.* v. *Stephen Norton* (4).

When we examine the evidence in the case before us, from this stand-point, what is the position? There is no room for doubt that the evidence improperly admitted was introduced with a view to influence the opinion of the Jury, and the character of that evi-

(1) (1913) 9 Cr. App. Rep. 236. (2) (1912) 8 Cr. App. Rep. 75.
(3) (1913) 9 Cr. App. Rep. 69; (1913) 3 K. B. 468; 23 Cox. 574.
(4) (1910) 5 Cr. App. Rep. 65; (1910) 2 K. B 496.

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dence justifies the conclusion that in all human probability, they were influenced thereby. As regards the residue of the evidence, it cannot be disputed that there are important contradictions; and this is not strange, as the oral evidence upon the question in controversy, which was one of identification, was adduced more than four years after the alleged incident. The majority of the witnesses who came forward to depose necessarily belonged to a class which does not inspire me with absolute confidence in their testimony; the most respectable amongst them identified the accused neither promptly nor without hesitation; on the other hand, the attempt made by the police to refresh the memory of some amongst them by photographs and suggestions is by no means reassuring. Finally, we cannot ignore the fact that even on the whole evidence as adduced at the trial (inclusive of the evidence improperly admitted) the verdict of the Jury was not unanimous; the very fact that they disagreed shows that to some minds, at any rate, there seemed to be doubts in the case. The substance of the matter then is that the residue of the evidence is by no means conclusive; if there are some considerations in favour of a conviction, there are others no less strong in favour of an acquittal; and I am not prepared to say that the Jury would—not might—have come to the same conclusion as they did upon the entire evidence. In such circumstances, in a case of extreme gravity like this where men are on trial for their lives, I feel no doubt as to the course to be adopted; in my judgment, the conviction and sentence upon both the accused must be quashed.

[**Fletcher, J.** agreed with Mookerjee, J.]

Chaudhuri, J.—The following is a short statement of the facts of the case before us:

It is said that the two accused lived for sometime about the end of 1914 in the house of a rich woman of the town named Dakho. They and Dakho occupied the first floor and she had prostitute tenants in the ground floor. Dakho became the mistress of accused No. 1 who had introduced himself as a wealthy Babu. He brought accused No. 2 there as his Durwan. On the 10th December 1914 the outer door of the house was padlocked by accused No. 2 at about midnight and both of them were in the upper floor that night. Next morning that door was found open with the padlock hanging from a ring attached to it, and the woman's room was found padlocked from outside. The other inmates thought she had gone out, but as she did not return, a search was made for her and the Police were eventually informed. The door was burst open and her dead body was discovered, the head practically completely severed

from the body and all her valuables gone. The two men were also missing. No trace of them could be found and the Police dropped the investigation in July 1915.

I now proceed to state the facts which led to their arrest and trial:

On the 14th November 1918, a woman of the town named Shama Sundari complained about a theft from her room of property of considerable value (about Rs. 4,000) against two persons naming them as Narain Babu and Mahabir Pandey who had introduced themselves as a rich man and a Durwan. Inspector Mohendra Nath Mukherjee was placed in charge of the investigation. In course of that enquiry he came across a woman of the town named Niroda who had a similar complaint, and gave the name of another woman named Sindhubala who also had a similar complaint against a Babu and a Durwan who used to accompany him. The man she said called himself Provash Kumar Roy alias Birendra Nath Roy. She gave the Police Officer a photograph of the Babu (Ex. 33). The photograph was shown to Shama Sundari and Niroda and they identified it as that of the Babu. This was on the 27th November, 1918. Sindhubala mentioned a woman of the name of Kiran, who told the officer that she had seen the men living together in a tiled hut at 6 Piarabagan Lane and took him there on the 28th November 1918. The officer got that house watched upto the 21st December 1918. No one came there. He then searched the house. Some ornaments were found amongst them, exhibits. 7 and 9 (a silver *tora* and a silver *gote*) and some letters and post cards, amongst them, exhibits 8 and 9. He received some information and went to Khulna. He returned to Calcutta on the 28th December 1918 and on some information watched another house 19, Goabagan Lane and *arrested* the second accused there next day. On the 5th of January 1919 he got the names of certain persons from another Police officer who was connected with the investigation of Dakho's murder. On the 9th of January 1919 he showed them the protograph exhibit 33. They identified it as that of the Babu who had lived with Dakho. The investigation continued. On the 11th of March at about 11 P. M. he was sent for by Niroda, who had managed to catch hold of accused No. 1 when he visited another woman of the town. The Inspector arrested him and entered a charge against him at once. The accused made a statement and took the officer to premises 5, Patuatola Lane which was searched and a shawl was found. A search list (exhibit 3) was prepared and the accused signed it as Punchanan Das. The shawl is item No. 11 in exhibit 3; 5 photo-

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graphs were also found, item 13 in exhibit 3. One of these was his and the others of himself and Sindhubala taken together. A receipt for a plaint was also found there. After some further investigation the case was sent up for trial. The charges framed against them are under sections 320, 320-114, 120B, 380-114 Indian Penal Code.

The most important point in this case is that of the identity of the two accused. The prosecution gave evidence how the accused were traced and arrested. Evidence of Shama Sundari, Niroda and Sindhubala in connection therewith was given by the prosecution, and it was contended on behalf of the Crown that they were entitled to give evidence, that the two accused went to rich prostitutes together, one introducing himself as a Babu and the other as his Durwan, that they assumed different names at different times and that these prostitutes missed valuables about the same time as they disappeared. That these were a series of acts, showing a system which the two used to pursue. As the matter was not covered by authority in this Court I reserved certain points which are fully set out in my note of reference. It also contains a summary of what was argued and refers to the cases cited.

Section 9 Evidence Act says that facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any person whose identity is relevant, or which show the relation of parties by whom any such fact was transacted, are relevant, in so far as they are necessary for that purpose.

I hold that it was competent for the prosecution in this case to prove facts showing that the two lived together, had business transactions together, that they used to correspond, that they visited rich prostitutes together, one of them introducing himself as a rich Babu and the other as his Durwan, that they were the same persons although they had given different names. These facts are relevant under section 9 of the Evidence Act, for establishing their identity and association. It was open to the defence to say that it was a case of innocent association. The question therefore arises "Is evidence to negative such defence permissible?" Section 14 lays down that facts showing the existence of any state of mind such as intention are relevant; Explanation (1), limits it thus:—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question. Explanation (2) however extends it making the previous conviction of a person a relevant fact where, upon

the trial of such person the previous conviction is relevant within the meaning of section 14.

In this connection section 15 Evidence, Act is important. It lays down that where there is a question, whether an act was accidental or intentional, *or done with a particular knowledge or intention* the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant. It is wrong to say that this section only deals with intention as opposed to accident. The words underlined were added by section 2, Act III of 1891, which must not be overlooked in construing section 15. The case for the prosecution is that the two accused used to introduce themselves to rich prostitutes as a wealthy master and servant. One of them used to remain in the room of the prostitute and the other, the durwan, kept guard. They lived in their houses for sometime to gain their confidence and when they found a favourable opportunity committed theft and disappeared. That is the system they pursued and it is urged that it is competent for the prosecution to prove it in order to show that when they came to Dakho they intended to rob her and that section 15 allows such evidence to be given namely that in other instances they played a similar part in the houses of other rich prostitutes whose valuables disappeared simultaneously with their disappearance, in order to show intent, guilty knowledge, design or system and that it is open to the prosecution to rebut the defence that they had met accidentally in Dakho's house, or that they had gone there without any dishonest motive, that is to say to give evidence of similar incidents although subsequent in date in which they were charged with having committed theft. I agree with that contention and hold that the evidence objected to was rightly admitted. The English cases in support of this view are referred to in my note of reference. I do not see any difference in the Indian Law on the subject. No one saw the accused committing the offences they are charged with. The direct evidence is that they were in the house that night and they disappeared the next morning, when the murder and robbery were discovered, but the case mainly depends upon collateral circumstances. I understood that my learned colleagues were prepared to hold that there was no doubt upon the evidence that the two men were in the house of the deceased that night and acted in concert and murdered and robbed her. I take it that they held that those two men whoever they were conspired to commit theft, committed it and also committed murder, the motive being theft.

No doubt evidence tending to show that the accused have been

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guilty of criminal acts other than those covered by the indictment is not admissible, unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to them : *Makin* v. *Attorney General New South Wales* (1), *R.* v. *Wyatt* (2). In this case no doubt the severed head proved it was murder, and the loss of the valuables, theft, but there was something more to be proved, namely, that the motive for the murder was theft and that the two persons who were in the house had combined to commit such theft. The murder and robbery were parts of one transaction. It is the general rule or law to admit evidence of motive. It was urged in this case as it was in *Makin* v. *Attorney General* (1) that evidence is admissible of any acts or doing of the person accused if such acts or doing are so connected with the transaction under charge or are of a character so similar thereto as to lead to a reasonable inference that the prisoner committed the act charged, but it is hardly necessary to discuss any general proposition of that character. Section 11 Evidence Act was invoked in aid by the prosecution but its terms are so general that I am not prepared to use it. In this case I am satisfied that the evidence was properly laid before the Jury and dissent from the opposite view.

Then the question arises what the Court is to do if the evidence is rejected. Sections 25 and 26 of the Letters Patent deal with the matter. It has been uniformly held in this Court, ever since the case of *Queen* v. *Hurribole* (3), that this Court is alone empowered to deal with the remaining evidence and give its final judgment on it, and not the Court below and that an order for retrial is not competent. Although I share the doubt of Pontifix J. as to the correctness of the ruling in *Hurribole* (1), I feel bound by it and subsequent rulings which have been uniformly followed all these years. The Privy Council has not also questioned it in *Subramania's* case (4) where it was cited. I think that it is entirely wrong that the accused should thus be deprived of the verdict of a jury and the function of the jury should be transferred to a bench of Judges which has to deal with the residue of the recorded evidence.

Section 167 Evidence Act has been held applicable to such cases. It says that we are to determine if there is sufficient evidence to justify the decision independently of the evidence objected to and admitted. I think there is. In so deciding I am keeping the

(1) 1894) A. C. 57. (2) (1914) A. C. 57.
(3) (1876) I. L. R 1 Calc. 207. (4) (1901) L. R. 28 I. A. 357.

evidence objected to entirely aside. I told the jury that it would not be improper for them to attach but little value to that part of the case and call attention to the penultimate paragraph of my note of reference.

I believe the evidence of identification, although the photograph of the accused No. 1 was shown to Manoda, Annada, Profulla and Giribala by the investigating officer before they were examined in Court. That they took time in identifying him when the photograph was first shown was natural as the man was dressed up when the photograph was taken. It was shown to them more than three years after they had seen him. Profulla's doubt when the accused was first shown to him after his arrest was also due to lapse of time. He had seen the man only on two occasions. On one of such occasions however he was with the accused for sometime. I do not think the shawl has been sufficiently identified. I place much reliance on the evidence of the silversmith as regards the *gota*, which was found in the box of accused No. 2. The other evidence about its identification is not without value. It is clearly established that these two were well known to each other and that they had given different names to different people and that accused No 1 is not a zamindar or zamindar's son, but a menial servant. The statements made by Manoda, Annoda, Panchu Keora and others to the Police soon after the occurrence I consider of great value. I have no hesitation in holding that both the accused, are guilty of the offences of murder, robbery and conspiracy to rob, as charged. It is not for us to speculate what the jury would have done. It is for us to arrive at a decision and after all, one's own mind is his best standard.

Walmsley, J.—I agree with the learned Chief Justice in holding that the evidence to which objection was taken was not admissible.

I accept the proposition that this Court has on previous occasions held that it cannot order a retrial.

On the merits, I am satisfied that the two accused before us are the men who caused the unfortunate woman's death. The evidence given by the inmates of the house and by the Doctor is of a convincing nature, and my learned brother who presided at the trial believed the witnesses to be speaking the truth. I do not think it necessary to ask what view a jury would take of the evidence ; except so far as the opinion of a hypothetical jury affords a standard of reasonableness. If it were necessary to ask such a question I should hold

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that of nine reasonable men at least two-thirds would believe the evidence; and having regards to the terms of the charge delivered by my learned brother I would go further and hold that as a matter of fact the seven jurors who found the accused guilty, found them guilty on the evidence to which objection cannot be taken.

Sir C. H. Kestven Kt. :—Government Solicitor for the Crown.

A. T. M. *Convictions set aside.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, and Sir Ernest Edward Fletcher, Knight, Judge.

CONSTANCE CATHERINE MORENO

v.

HENRY WILLIAM BUNN MORENO.

CIVIL.
1920.
March, 25.
April, 7.

Divorce—Adultery admitted—Co-habitation, resumption of—Condonation—Subsequent matrimonial offence—Condonation, cancellation of—Divorce, ground for, revival of—Desertion by wife—Effect of original adultery, if revived—Petition by husband—unreasonable delay—Poverty of petitioner, when an excuse—Indian Divorce Act (IV of 1869), Secs. 12, 13, 14.

It is well settled that resumption or continuance of co-habitation with complete knowledge of all the circumstances operates as condonation.

Mere forgiveness is not condonation; to be condonation, it must completely restore the offending party and must be followed by co-habitation. This is essentially the view adopted by the Indian Legislature in section 14 which requires that no adultery shall be deemed to have been condoned, unless where conjugal co-habitation has been resumed or continued. The expression conjugal co-habitation, or its equivalent connubial intercourse, should not be given a restrictive meaning but should be so interpreted as to leave the nature of the co-habitation or intercourse to be adapted to the varying conditions and circumstances of different parties: *St. Croix* v. *St. Croix* (1) referred to.

Condonation of past matrimonial offences is however impliedly conditioned upon the future good behaviour of the offending spouse, and it follows that if after condonation, the offences are repeated, the right to make the condoned offences a ground for divorce revives; to constitute a revival of the condoned offences, the offending spouse need not however be guilty of the same character of offence as that condoned; any misconduct is sufficient which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied.

Desertion subsequent to condonation that would revive the effect of the original adultery exists if one party to a marriage without the consent or against the will of the other wilfully cause or without reasonable excuse makes the other live apart.

The Courts look with great suspicion on petitions for dissolution of marriage presented on the ground of adultery, after long delay by a husband and relief is given *vigilantibus non dormientibus*†; yet delay will generally be excused if it is really due to poverty: *Coode* v. *Coode* (2) referred to.

But although poverty is almost always a sufficient excuse if convincingly established, it must not be supposed that there is no lapse of time where a line may be drawn.

* Appeal from Original Decree No. 5 of 1920 against the decision of Mr. Justice Greaves, dated 24th November, 1919.

(1) (1917) I. L. R. 44 Calc. 1091. (2) (1838) 1 Curt. 755.

[† To the vigilant, and not to the sleepy—Rep.]

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Harrison v. *Harrison* (1); *Nicholson* v. *Nicholson* (2); *Short* v. *Short* (3); *Mitter* v. *Mitter* (4), and other cases referred to.

Where admittedly the husband became aware of the adultery of the wife towards the end of the year 1913 and the petition for dissolution of marriage was presented on the 19th December, 1918, and no sufficient reasons were shewn to justify the delay:

Held, that the petitioner has delayed action too long and cannot justly claim an order for dissolution of marriage.

Appeal by the Respondent wife.

Suit for dissolution of marriage instituted by the husband on the ground of wife's adultery. The wife did not deny the charge of adultery, but pleaded condonation and unreasonable delay. These pleas were not established in the primary Court and decree *nisi* was made with the custody of the child of the marriage.

The material facts will appear from the following judgment of

1919.

November, 24.

GREAVES, J.—The petitioner prays for the dissolution of his marriage with the respondent on the ground of her adultery with one Pratti now deceased sometime in or about the years 1907 and 1908. The respondent does not deny the adultery alleged and admittedly gave birth to two children in or about the years 1907 and 1909 of which Pratti was the father but she alleges that the petitioner condoned her adultery with Pratti and it is also urged that the petitioner is debarred from obtaining the relief which he seeks by reason of his delay in instituting these proceedings. The petitioner admits knowledge of his wife's adultery with Pratti in the year 1914 in or about the month of January or February and these proceedings were not instituted until the 19th December, 1918, that is to say, more than 4 years after the petitioner came to know of the adultery upon which he relies. He urges in palliation of his delay his lack of means to institute these proceedings.

The parties were married at St. Andrew's Church in this city on the 21st May, 1902, and lived together and cohabited at 19 Wellesley Street and 23 Free School Street until the month of February, 1905. During this period two children were born to them, a daughter Constance Susan Moreno who is now of the age of 16 years and a son who is dead. The daughter is now leaving with her mother and has always lived with her and the petitioner asks for her custody. In the month of February, 1905, the respondent left the petitioner and they lived apart until the year 1912 or 1913. The petitioner

(1) (1864) 3 Sw. & Tr. 362. (2) (1873) L. R. 3 P. & D. 53.
(3) (1874) L. R. 3 P. & D. 193. (4) (1908) 12 C. W. N. 1009.

alleges that the respondent left him of her own accord owing to quarrels which arose from her violent temper; the respondent alleges that she left him as the petitioner objected to the children by her former marriage living with them and because he threatened her and used violence to her. These matters were not gone into before me and it is not suggested that the husband's conduct conduced to the adultery alleged and admitted. I propose to deal with the suit on the footing that the parties mutually agreed to separate.

In the year 1909 divorce proceedings were commenced against his wife by one Abro in which proceedings the petitioner was made a co-respondent and in the year 1910 the respondent commenced divorce proceedings against the petitioner grounded on the adultery alleged in the Abro suit. The Abro suit was dismissed so far as the petitioner is concerned with costs and the respondent's suit was also dismissed. In the course of the proceedings in the respondent's suit as a result of an anonymous letter received by the Judge who tried the suit, an enquiry was made by the Government solicitors, the result of which is contained in Exhibit 6a, petition to the Court by the Government solicitor. Paragraph two of the petition which is dated the 18th November, 1910, states that two children were born to the respondent by Pratti and that the 2nd child died aged 5 months in January 1909. Paragraph 3 of the petition states that the 1st child was at the date of the petition in the Entally convent. This disproves the respondent's allegation that the child was always with her and was placed in the convent at the petitioner's suggestion in 1912 and 1913 at the time the parties came together again; it also throws doubt in the evidence of the daughter that she took the child to the Armenian College in 1912 and 1913 and showed the child to the petitioner. Exhibit 6 is the respondent's exhibit and if paragraph 3 is incorrect she could have disproved it from the books of the convent which presumably show the date of the child's admission, paragraph 4 of the petition of the Government solicitor suggests collusion and I understand that as a result of the matters stated in that petition the proceedings for divorce were dismissed. The petitioner states that he was living at Allahabad at this time and that he only came to Calcutta occasionally, his answer in the Abro suit sworn on the 5th January, 1910, and his affidavit of documents in that suit sworn on the 12th April, 1910, appear to have been sworn at Allahabad.

The respondent alleges that at the time of the proceedings in her suit the petitioner must have come to know of exhibit 6 and that he consequently must in the year 1910 have had knowledge

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of the facts with regard to her adultery with Pratti. The petitioner denies any knowledge of exhibit 6 until the year 1914 when he says that as the result of Police Court proceedings commenced by his wife for maintenance the fact of her adultery with Pratti came to his knowledge, as a result of which he made enquiries and discovered the existence of exhibit 6. It would appear from Exhibit 1 that the petitioner had in the year 1908 been seeking for materials upon which to found divorce proceedings against his wife and is said on behalf of the respondent that his enquiries at this time must have brought to his knowledge the facts about Pratti. I do not think that this can be so as it is not suggested that Exhibit 1 is not genuine and if the facts about Pratti had then been within his knowledge he had at that time ample material upon which to found his proceedings. And if in 1910 he had known of Exhibit 6 and the facts as to Pratti it is curious that he did not make use of these facts to commence divorce proceedings which he had contemplated as recently as August, 1908, according to Exhibit I.

In 1913 according to the petitioner and in 1912 according to the respondent the parties as the result of a friend's intervention came together again and lived and cohabited at the Armenian College. The respondent swears that prior thereto she made a full confession to the petitioner of the facts as to Pratti and that he forgave her and that thereafter they lived and co-habited together, the petitioner denies that any such confession was made or that prior to the resumption of co-habitation or during such co-habitation he knew of the facts as to Pratti. It is at least curious that if such confession were made it was not pleaded in the respondent's answer and I am not prepared to credit the story of the respondent as to the confession. The story of the daughter's bringing the child to the Armenian College I have referred to already, it is discredited by Exhibit 6 and I cannot rely on it.

Then it is said that prior to the reconciliation in 1912 the petitioner was to see the respondent at Huzurimall's Lane and that he must have seen the offspring of the intercourse with Pratti there but this is contradicted by Exhibit 6, if in fact the child was at the Entally convent in 19.0 and was not removed subsequently.

In December, 1913, the parties again separated and the respondent commenced proceedings in the Police Court for maintenance against the petitioner. I understand that the proceedings were subsequently withdrawn, the petitioner and respondent having come to an arrangement. In November, 1914, the respondent again commenced proceedings for maintenance, the petitioner was examined

in December 1914, and stated that he heard two years previously from friends that his wife had committed adultery with Pratti, that he denied it and that he accepted her denial but that in January 1914, I think on the 30th he learnt that she had placed a child which was not his, aged 4 years, in the Entally convent and that he never co-habited with her after he had satisfied himself that she had committed adultery. In cross-examination he stated that he lived with his wife for one year in 1913, that he discovered about Pratti about the middle of 1913 and that she lived with him up to the end of 1913, but I think reading the Police Court evidence as a whole that it does not mean that the petitioner admitted that he continued to live and cohabit with his wife after he knew of her adultery with Pratti. Stress was laid on behalf of the respondent on the letters contained in Exhibit 5 as showing the parties were on friendly terms after the petitioner knew of the respondent's adultery with Pratti but even if the pencil dates are correct, which are said not to be in the petitioner's writing. I do not think they amount to much; they were written after the first proceedings in the Police Court when the parties had come to some arrangement as to maintenance and they cannot by themselves be taken as condoning the matrimonial offence which the respondent had committed. The same applies to Exhibit 7. Exhibit 2 is written in 1906 after the parties had separated but the respondent's relations with Pratti had not so far as I know commenced at this time, and nothing I think turns on Exhibit 3.

On the whole I have come to the conclusion that the respondent on whom the burden falls has not established that the petitioner at any time condoned her acts of adultery with Pratti. She has herself stated in evidence that her relations with Pratti were not known to her friends and were secret and if the child was sent to the convent in or prior to 1910 at which time Mr. Moreno was in Allahabad it may well be that he never heard of its existence. I have already referred to the alleged confession but it is noticeable in this connection that in the Police Court only one child is mentioned and the petitioner swears that he never heard of the second child until subsequent proceedings by his wife in the Small Cause Court. The petitioner admitted that he had suspicions of his wife's infidelity but suspicion is not proof and for the resumption of cohabitation to have amounted to condonation involves that the petitioner must have had knowledge of all the facts prior to the cohabitation and that with such full knowledge he condoned the matrimonial offences and resumed cohabitation. On the whole I

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have come to the conclusion that condonation has not been established.

There remains the question whether the petitioner has been guilty of such unreasonable delay in commencing proceedings as to disentitle him to the relief which he seeks. In *Mitter* v. *Mitter* (1), there was five years delay and no satisfactory explanation of the delay and relief was refused. In *Short* v. *Short* (2), there was a delay of 14 years without reasonable excuse and the petition was dismissed. In *Nicholson* v. *Nicholson* (3), 2 years delay explained by lack of means, was held not to disentitle the petitioner to relief.

I infer from the cases that poverty is almost always a sufficient excuse but that it must be convincingly established ; see *Mason* v. *Mason* (4).

In the present case there has been over 4 years delay in fact, nearly five. From the evidence it appears that the petitioner's income during this period has been Rs. 250, a month out of which he has paid at first voluntarily and subsequently under a maintenance order for the support of his wife and daughter some Rs. 50, a month. I am not taking the Press which he owns, into account in estimating the income as it would appear that the income from this source has been intermittent and at times there has been a loss. The petitioner states that during the period in question he has had debts to pay. I think the case is rather near the line and I feel some hesitation but I have to bear in mind that divorce proceedings by the husband usually involve an almost immediate payment of a substantial sum for his wife's costs in addition to the burden of his own and taking into account all the circumstances I am not prepared to say that in this case there has been such unreasonable delay as to disentitle the petitioner to the relief which he seeks.

There will accordingly be a decree *nisi* with the custody of the child of the marriage.

Against this decree the respondent appealed.

Mr. J. N. Mitter for the Appellant.

Messrs. Avetoom and *Messrs. R. C. Bonnerjee* for the Respondent.

C. A. V.

The judgments of the Court were as follows :

April, 7.

Mookerjee, A. C. J. :—This is an appeal against a decree *nisi* for dissolution of marriage made upon a petition presented by a husband under section 10 of the Indian Divorce Act, 1869, on the

(1) (1908) 12 C. W. N. 1009.
(2) (1874) L. R. 3 P. & D. 193.
(3) (1873) L. R. 3 P. & D. 53.
(4) (1883) L. R. 8 P. D. 21.

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ground that his wife had, since the solemnization of the marriage, been guilty of adultery.

The petitioner and the respondent were married on the 21st May, 1902, and lived together until the month of February, 1905. During this period, two children were born to them, a daughter, now sixteen years of age, and a son who is dead. In February, 1905, the respondent left the petitioner and lived apart till the end of the year 1912, or the beginning of the year 1913. The petitioner alleges that after the respondent had left him, she lived in adultery with one Pratti now deceased. She gave birth to two children in 1907 and 1908; but the petitioner was not aware either of the adultery with Pratti or of the birth of the children. In 1909, one Abro commenced divorce proceeding against his own wife and made the petitioner a co-respondent, on the allegation of adultery with her. Shortly after, in 1910, the respondent instituted divorce proceedings against the petitioner on the basis of the adultery alleged in the *Abro* suit. Both the suits were dismissed as against the petitioner. In 1912, the petitioner and the respondent became reconciled through the intervention of a friend, and from the beginning of 1913, they resumed co-habitation. According to the petitioner, he discovered, for the first time, towards the end of that year or in the beginning of next year, that his wife had committed adultery with Pratti and that children had been born of the intercourse. The parties accordingly separated again. The respondent instituted proceedings before a Presidency Magistrate for maintenance order under section 488 of the Criminal Procedure Code, but withdrew them as the parties came to an arrangement. In December, 1914, she again instituted similar proceedings, and on the 6th January, 1915, the Magistrate made an order in her favour directing the petitioner to pay her maintenance at the rate of Rs. 50 per month. On the 19th December, 1918, that is, nearly four years after the date of the maintenance order, the petitioner commenced the present proceedings for dissolution of marriage and for the custody of his daughter. The respondent did not deny the alleged adultery, but opposed the petition substantially on two grounds, namely, first, that the petitioner had condoned the adultery, within the meaning of section 13 of the Indian Divorce Act, and secondly, that the petitioner had been guilty of unreasonable delay in presenting the petition, within the meaning of section 14. Mr. Justice Greaves has overruled both these contentions and has granted the husband a decree nisi for dissolution with the custody of the child of the marriage. The respondent has appealed to this Court,

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and counsel on her behalf has reiterated the two defences which were unsuccessfully urged in the trial Court.

As regards the first contention, namely, that the husband had condoned the adultery and was consequently no longer entitled to an order for dissolution of marriage, reliance has been placed upon the admitted fact that the parties resumed cohabitation in 1913. The only point in controversy is, whether at the time when cohabitation was resumed or during the continuance thereof, the husband was aware of the antecedent adultery on the part of his wife. The wife asserts that he had full and definite knowledge of all the circumstances before co-habitation was resumed; the husband maintains on the other hand that he had no such knowledge when he took back his wife and that as soon as he made the discovery, he separated from her in the beginning of 1914. There is conflict of testimony on this point; and upon an examination of the evidence we have arrived at the conclusion that, even though it may be difficult to ascertain whether the story narrated by either party is true in all its details, there is no room for reasonable doubt that, after cohabitation had been resumed, the husband became aware of the misconduct of his wife, and notwithstanding such knowledge continued to cohabit with her. Upon this part of the case, we have the following definite statement made by the husband on the 6th January, 1915, in the course of the maintenance proceedings instituted by his wife in the Court of the Presidency Magistrate: "I lived with my wife for one year in 1913. I discovered about Pratti about the middle of 1913. She lived with me up to the end of 1913." The statement was put to him in cross-examination by Mr. Mitter, and it is sufficient to state that the witness was not able to explain it away satisfactorily. Besides this, indications are not altogether lacking that the petitioner was in all likelihood aware of the misconduct of his wife, much earlier than 1913. In the divorce proceedings instituted by the respondent against the petitioner, shortly after the Abro suit, Mr. Justice Pugh received an anonymous letter on the 19th August, 1910. The letter was sent to the Government solicitor, who submitted a report on the 18th November, 1910, embodying the result of the enquiries made by him. This report states definitely that the then petitioner (the wife) had in 1907 and 1908 committed adultery with Pratti and that she had in 1907 given birth to a daughter who was in the Entally Convent in the suburbs of Calcutta and in 1908 again given birth to another daughter who had died on the 1st January, 1909, an infant five months old. The Government solicitor added in the

report that there was good ground to believe that there was collusion between the husband and the wife in the matter of those divorce proceedings. This report was made part of the record, and the proceedings were, as already stated, discontinued immediately afterwards. No doubt, direct evidence is not available to show that the petitioner became aware of the contents of this report; but it looks very improbable that he could have remained totally ignorant of a report of this character which was filed in Court. He was a party to those proceedings and may reasonably be expected to have enquired why the proceedings suddenly collapsed. On the other hand, if the proceedings were collusive, as suspected by the Government solicitor, that significant fact alone materially weakens his case. We cannot also overlook that although in 1909 and 1910 the petitioner used to live at Allahabad, he was in Calcutta in 1908 and employed a detective to watch his wife who had left his protection and had already given birth to two illegitimate children, the survivor of whom was subsequently placed in the Entally convent. It seems hardly probable that a person in the position of the petitioner should remain entirely ignorant of the mode of life led by his wife and the consequences thereof. But even if all these circumstances do not show conclusively that he had definite knowledge of the misconduct of his wife before he resumed cohabitation with her, there is no escape from his own statement made on the 6th January, 1915. The question thus arises whether there was such condonation on his part as is contemplated by sections 12 and 13 of the Indian Divorce Act.

It is well settled that resumption or continuance of co-habitation with complete knowledge of all the circumstances operates as condonation. Sir C. Creswell explained in *Peacock* v. *Peacock* (1), that condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances. Lord Chelmsford held in *Keats* v. *Keats* (2), that condonation is a blotting out of the offence imputed, so as to restore the offending party to the same position as he or she occupied before the offence was committed. In *Ellis* v. *Ellis* (3), condonation of matrimonial offences was explained to mean the complete forgiveness of all such offences as were known to or believed by the offended spouse so as to restore between the spouses the status *quo ante*. Consequently, mere forgiveness is not condonation: to be condonation, it must completely restore the offending party and must be followed by cohabitation. This is essen-

(1) (1858) 1 Sw. & Tr. 183.
(2) (1859) 1 Sw. & Tr. 334.
(3) (1865) 4 Sw. & Tr. 154.

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tially the view adopted by the Indian legislature in section 14 which requires that no adultery shall be deemed to have been condoned, unless where conjugal cohibitation has been resumed or continued. The expression conjugal cohabitation, or its equivalent, connubial intercourse, should not be given a restrictive meaning but should be so interpreted as to leave the nature of the cohabitation or intercourse to be adopted to the varying conditions and circumstances of different parties: *St Croix* v. *St Croix* (1). There may thus be room for discussion or difference of opinion in individual instances, whether a particular conduct on the part of the husband or the wife could be construed as condonation. But the present case is reasonably free from difficulty, because, as was said in *Windham* v. *Windham* (2), the best evidence of condonation is the continuance or resumption of sexual intercourse. Here the parties lived as husband and wife for several months in 1913, even after the husband had discovered the misconduct of his wife. We must hold accordingly that the respondent has successfully established condonation of the adultery complained of.

Counsel for the petitioner has argued that, if this view be adopted he is entitled to invoke the aid of the well-established principle that condonation is cancelled by a subsequent matrimonial offence and the old cause of complaint is revived. Reliance has been placed upon the decision of my learned brother Mr. Justice Fletcher in *Thompson* v. *Thompson* (3), where it was conclusively shown, upon an exhaustive review of the relevant authorities on the subject, that condoned adultery is revived by a subsequent matrimonial offence. This principle is based on the theory that condonation of a matrimonial offence implies that no further matrimonial offence shall occur. Amongst recent cases, where this doctrine has been recognised and applied may be mentioned: *Price* v. *Price* (4); *Moss* v. *Moss* (5); *Roberts* v. *Roberts* (6). We may then treat it as well-settled that condonation of past matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse, and it follows that if after condonation, the offences are repeated, the right to make the condoned offences a ground for divorce revives; to constitute a revival of the condoned offences, the offending spouse need not however be guilty of the same character of offences as that condoned; any misconduct is sufficient

(1) (1917) I. L. R. 44 Calc. 1091 (1107).
(2) (1863) 32 L. J. P. M. & A. 89; 9 Jurist (N. S.) 82.
(3) (1911) I. L. R. 39 Calc. 395.
(4) (1911) P. 201.
(5) (1916) P. 155.
(6) (1917) 117 L. T. 157.

which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied. But there is, in our opinion, no room in the present case for the application of this rule in favour of the husband. The argument on his behalf is that desertion by his wife, subsequent to what constitutes condonation on his part, revived the effect of the original adultery. The facts admitted or proved, however, negative this plea of desertion. It is desertion if one party to a marriage, without the consent or against the will of the other, wilfully, without cause or reasonable excuse, makes the other live apart. Here the parties separated in the beginning of 1914. Immediately afterwards, the wife had recourse to maintenance proceedings under the Criminal Procedure Code, which were withdrawn because the parties came to an arrangement. Some months later, she again instituted maintenance proceedings and obtained an order under section 488 Criminal Procedure Code, sub-section (4) whereof lays down that no wife shall be entitled to receive an allowance from her husband if, without any sufficient reason, she refuses to live with her husband. In view of this provision, it is impossible to maintain the position that the Magistrate made an order for maintenance, although the wife had deserted her husband and refused to live with him without any sufficient reason. Consequently, we must hold that the principle recognised in *Blandford* v. *Blandford* (1), that condoned adultery is revived by subsequent desertion and condoned desertion by subsequent adultery is of no assistance to the petitioner.

As regards the second contention, we are clearly of opinion that the petition should have been dismissed on the ground that the husband had been guilty of unreasonable delay in presenting it. We ignore, for the present purpose, the allegation of the respondent that her husband was aware of her misconduct in 1912, and limit ourselves to the statements of the petitioner. According to the statement made by him in these proceedings, he became aware of the adultery of his wife, towards the end of the year 1913. According to the statement made by him on the 6th January, 1915, he had made the discovery about the middle of 1913. Whichever date is accepted—though we must prefer the middle of 1913 as the more probable time—it is plain that sufficient reasons have not been shown to justify the delay in the institution of these proceedings. The only plea urged is poverty. Now, the Courts look with great suspicion on petitions for dissolution presented on the ground of adultery, after long delay by a husband, and relief is given, as is said in

(1) (1883) 8 P. D. 19.

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Mortimer v. *Mortimer* (1), *Vigilantibus non dormientibus* ;* yet delay will generally be excused if it is really due to poverty ; *Coode* v. *Coode* (2). But although poverty is almost always a sufficient excuse, if convincingly established [*Short* v. *Short* (3)], it must not be supposed that there is no lapse of time where a line may be drawn. These principles have been recognised in a long series of decisions ; *Harrison* v. *Harrison* (4) ; *Nicholson* v. *Nicholson* (5) ; *Short* v. *Short* (3) ; *Mason* v. *Mason* (6) ; *Edwards* v. *Edwards* (7) ; *Pears* v. *Pears* (8) ; *Hughes* v. *Hughes* (9) ; *Coppinger* v. *Coppinger* (10) ; *Mitter* v. *Mitter* (11). Now, in the case before us, the petitioner had admittedly an income of Rs. 250 a month and, for sometime at any rate, resided in the College premises where he worked. He had also a small printing press. It must further be borne in mind that he has acquiesced in the order of the Magistrate which made him liable to pay his wife, after he had knowledge of her misconduct, Rs. 50 a month from January, 1915. We are not prepared to hold, under these circumstances, that the petitioner has established satisfactorily such poverty as would constitute an excuse for the undoubted delay in the institution of these proceedings. We should not further wholly ignore the probable effect of an order for dissolution of marriage on the wife who is older than her husband and must now be fairly advanced in years. Indeed, the circumstances of the case point to the conclusion that the proceedings have been instituted, not so much because the petitioner feels aggrieved by the misconduct of his wife (which has been within his knowledge for several years), but rather because he is anxious to get rid of the order for maintenance (which was made against him now more than five years ago). Upon a review of all the facts and circumstances, our conclusion is that the petitioner has delayed action too long and cannot now justly claim an order for dissolution of marriage.

The result is that this appeal is allowed and the petition dismissed with costs in both Courts.

Fletcher, J.—I agree.

(1) (1820) 2 Hag. Con. 310.
(2) (1838) 1 Curt. 755.
(3) (1874) L. R. 3 P. & D. 193.
(4) (1864) 3 Sw. & Tr. 362.
(5) (1873) L. R. 3 P. & D. 53.
(6) (1882) 7 P. & D. 233 ; (1883) 8 P. D. 21.
(7) (1900) 17 T. L. R. 38.
(8) (1912) 107 L. T. 505.
(9) (1915) 32 T. L. R. 62.
(10) (1918) 34 T. L. R. 588.
(11) (1908) 12 C. W. N. 1009.

* Laws come to the assistance of the vigilent, not of the sleepy—Rep.

Babu Jyotindranath Mitra—Solicitor for the respondent (wife) Appellant.

Messrs. Khaitan & Co.—Solicitors for the petitioner (husband) Respondent.

D. K. R.

Appeal allowed : petition dismissed.

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APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, Sir Ernest Edward Fletcher, Knight, Judge, and Mr. Justice Richardson.

GOPESWAR PYNE

v.

HEM CHANDRA BOSE AND OTHERS.*

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1920.
April, 27.

Letters Patent, Cl. (15), appeal under—Agreement as to some points by the Divisional Bench—Decree—All points open for consideration—Registration—One of the parties appearing for registration, effect of.

Where the transactions were separate and independent, and if the learned Judges of the Division Bench were agreed as to one or more of them, effect should be given to their view, though they disagreed as to another or the others.

The whole case is open in an appeal under the Letters Patent against the decision of the Division Bench and all the points necessary to be investigated for the determination of the question of the correctness of the decree are open for consideration : *Upendra* v. *Bindeshri* (1).

Where a document is executed by one of two parties on behalf of himself and the other, he is competent to present it for registration and the registration is not invalid for non-appearance of the other party : *Bissendoyal* v. *Schlaepfer* (2).

Appeal by the Plaintiff.

Suit to enforce mortgage bonds.

The material facts appear from the judgment of Greaves, J.

* Letters Patent appeal No. 1 of 1919 from the decision of Teunon and Greaves, JJ. dated the 3rd January, 1919, in Appeal from Original Decree No. 238 of 1916, against the decision of Babu Baroda Prosad Roy, Subordinate Judge of Midnapore, dated the 31st July, 1916.

(1) (1915) 22 C. L. J. 452.

(2) (1874) 22 W. R. 68.

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January, 3.

The judgments of the Court (Teunon and Greaves, JJ.) were as follows :

Greaves, J.—This is an appeal by the plaintiff against a decision of the Subordinate Judge of Midnapur, dated the 31st July 1916, dismissing the suit. The defendants Nos. 1 and 3 appeared to contest the appeal.

The suit was brought to enforce five mortgage bonds respectively dated the 12th September, 1903, the 25th September 1903, the 18th November 1903, the 18th December 1903, and the 1st February 1904, and executed in favour of the plaintiff by the 2nd defendant Moni Mohan on his own behalf and as attorney for his wife, the first defendant, under a general power of attorney executed by her in his favour on the 26th November 1892. The mortgage premises are the same in all five mortgages and consist of a money decree obtained by the 1st defendant in suit No. 16 of 1892 on the 26th November 1892, against Fakir Roy and others in pursuance of which she attached a moiety of the premises set out in the schedule to the mortgages which moiety subject to the attachment was at the date of the mortgage-bonds in suit vested in the second defendant as the representative of Fakir Chand. The first defendant subsequently brought the moiety of the property to sale in execution of her decree and herself purchased the moiety, the sale being confirmed on the 3rd November 1904. She subsequently purchased the other moiety of the zemindari and mortgaged the whole zemindary to the defendant No. 3 on the 31st May 1905 : the defendant No. 3 subsequently obtained a decree on his mortgage and in execution of of this decree the defendant No. 3 brought the property to sale and himself purchased it on the 23rd November 1907.

The Subordinate Judge has dismissed the suit on the following grounds :

First.—That he was not satisfied upon the secondary evidence of the power of attorney which was given that the second defendant had authority to execute the mortgage-bonds and present them for registration. *Second.*—That the power of attorney is vitiated by the fact that it was registered at Midnapur where defendant No. 1 did not reside. *Third.*—That the defendant No. 1 did not execute the power with full knowledge of its contents. *Fourth.*—That as the property was at the date of the execution of the mortgage-bonds subject to an attachment in respect of which it was subsequently sold, the plaintiff can no longer claim to enforce the mortgage-bonds against the moiety of the mortgaged premises.

Fifth.—That the mortgage-bonds are not *bona fide*, that is to say that the purported consideration did not pass. As some arguments have been addressed to us based on that wording of the power of attorney and of the mortgage-bonds it is necessary to refer to them in some detail before dealing with the findings of the Subordinate Judge. In the power of attorney of which a plain copy was produced before the Subordinate Judge, the first defendant is described as the wife of Moni Mohan Roy, inhabitant of the city of Chinsurah, at present of Nabagram station and Sub-Registry Dhaniakhali, District Hooghly, and she thereby (*inter alia*) empowered her husband for saving any property or purchasing any property or for any other reason if there was any necessity to borrow money on her behalf and empowered him to execute a document by signing her name in his *bakalam* and to get the same registered and the document provides that if there was any necessity to sell any property or to mortgage or transfer the same and if the second defendant executed a document by signing her name in his *bakalam* and got the same registered that the same would be considered to be her own act and the document entitled him to give or take a loan and to purchase or sell properties or to mortgage them as he thought necessary and to sign her name in his *bakalam* and that the acts done by him should be considered in every way as acts done by her. The document is attested by Akhoy Kumar Bose, who gave evidence in the suit, by Nani Lal Roy and Bhuth Nath Roy, the two latter being respectively the brother and cousin of defendant No. 1. The document bears an endorsement by the Sub-Registrar of Midnapur, that it was executed by the first defendant in his presence her identity being proved by the testimony of her brother Nani Lal Roy.

The mortgage of the 12th September, 1903, recites that the first defendant was in need of money and the advance is made to her the receipt being acknowledged by her and the second defendant, and the first defendant assigns by way of mortgage all monies due and payble to her under the decree and all the benefits and advantages thereof, interest is at the rate of 12 per cent. per annum payable monthly with mothly rests and the second defendant charges his right, title and interest in the scheduled properties. It is executed by Hari Dasi by her constituted attorney the second defendant and also by the second defendant and it is attested by Bhupendra Nath Bosu, solicitor, Raj Kishore Basak, solicitor and by Kanai Lal Pyne, the plaintiff's brother, the memorandum of consideration showing that the payment was made by a cheque for Rs. 400 drawn by Babu

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B. N. Basu in favour of defendant No. 2 and by Rs. 600 in small note. It was presented for registration by the second defendant who admitted execution for himself and his wife. The mortgage of the 25th September 1903, recites that the first defendant had requested the plaintiff to lend her Rs. 1,000 and in consideration of this sum lent by the plaintiff to the first defendant at the request of the second defendant, the first defendant charges all moneys due and payable to her under the decree—interest is at the rate of Rs. 1-8 payable monthly by monthly rests. It is attested by Raj Kishore Basack, Kanai Lal Pyne and Hem Chandra Banerjee, clerk to Messrs. B. N. Basu and Company and it is executed by Hari Dasi by her attorney and also by the second defendant, the consideration being paid in a Government Promissory note for Rs. 500, three Notes of Rs. 300 each and small notes for Rs. 200. It was presented for registration by the second defendant who admitted execution for himself and his wife.

The mortgage of the 18th November 1903, recites that the first and second defendants were in further need of money and the second defendant acknowledges receipt and payment of the consideration—interest is payable monthly at the rate of Rs. 18 per cent. with monthly rests. It is executed by the first defendant by her attorney and by the second defendant and attested by Raj Kishore Basack and Kanai Lal Pyne, the consideration is paid in one note of Rs. 180 and in small notes and cash Rs. 900 and the property charged is (*inter alia*) the sum due and payable under the decree, the registration endorsement is substantially the same as in the previous mortgages.

The mortgage of the 8th December 1903, recites that the first and second defendants were in further need of money, it is signed by the first defendant, her attorney and by the second defendant, it is attested by Raj Kishore Basack and Kanai Lal Pyne, the memorandum of consideration being as to Rs. 200 ten notes of Rs. 20 and 80 of Rs. 10. The last mortgage that of the 1st February 1904, recites that the loan is made at the request of defendants Nos. 1 and 2 to defendant No. 1, the interest is 18 per cent. per annum payable monthly with quarterly rests, it is signed by the first defendant by her attorney and by the second defendant and attested by Raj Kishore Basack, Ajodhya Nath Mukherjee and Kanai Lal Pyne. The consideration was paid in 500 notes of Rs. 10 each, the money was in fact kept in deposit and applied from time to time, so it is said, for the purpose of meeting the expenses or realising rents and conducting law suits at Midnapur and in Calcutta.

I now come to deal with the grounds upon which the Subordinate Judge has dismissed the suit which I have set out above. With regard to the first ground I think upon the evidence before him that the Subordinate Judge should have come to the conclusion that the power did contain a power to mortgage, but discussion upon this point is really academic as the actual power has been produced before us and its genuineness has been quite rightly admitted by the learned vakil for the respondent defendant No. 3, and we have accordingly admitted it in evidence on the appeal. With regard to the second point the power of attorney was registered at Midnapur and it appears that it was written at the house of Naba Babu there where Hari Dasi stayed for eight days, Moni Mohan having hired the house for the purpose (see the evidence of Akhoy Kumar Basu, plaintiff's witness No. 5). In the power she is, as already stated, described as an inhabitant of Chinsurah and the Subordinate Judge finds that she generally resided in the Hooghly District or in Calcutta. Under these circumstances the Subordinate Judge finds that under section 33 of the Registration Act the power of attorney could not be authenticated before the Sub-Registrar and that it is null and void and that accordingly defendant No. 2 had no power to execute the mortgage-bonds and present them for registration on behalf of his wife. On behalf of the appellant this finding is challenged as it is said that the word "resides" in clause 33(1) (*a*) of the Registration Act does not mean permanent residence but is satisfied if the principal is temporarily residing in the district at the time of execution. It is further urged that even if "resides" means permanent residence that a power *per se* does not require registration if the donee thereunder is to present a document for registration under clause 32 (b) of the Act and that as Moni Mohnn executed the mortgage bonds as a principal and as his wife's agent under the power he was competent to present them for registration and reliance is placed on *Bissenloyal* and *Hurloyal* v. *Ferdinand Schlaepfer* (1), which decides that where a document is executed by one of two parties on behalf of himself and the other it is sufficient that the person executing it appears before the registering officer the other party not being required to appear. That is a decision upon section 34 of the Registration Act of 1871 under which all the persons executing the document or their representatives, assigns or agents authorised under a power of attorney conforming with the provisions of section 33 of that Act were required to attend for registration. The document in that case was executed by one of the parties on his own behalf

(1) (1874) 22 W. R. 68.

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and on behalf of his co-lessor. No power of attorney was proved to exist but despite this it was held that as it was presented for registration by the person who executed it for himself and his co-lessor, the document was duly registered under section 34. I am inclined to think that Hari Dasi did not reside in Midnapur within the meaning of section 33(1) (a) of the Registration Act as her residence was only of a temporary character although it is not necessary to decide this as I think that Moni Mohan as having executed the mortgage bonds on his own behalf was competent to present them for registration under the provisions of section 32 and that they were validly registered. This being so, I think, the decision of the learned Subordinate Judge was wrong on the second point.

With regard to the third point the first defendant has not given evidence. One of the attesting witnesses Akshoy Kumar Basu (plaintiff's witness No. 5), a pleader's mohurir has stated that the power of attorney was read over to Hari Dasi, this evidence was given 24 years after the document was executed and I am not inclined to attach much value to it, but we have the fact that the document was attested by a brother and by a cousin of the lady and it is not suggested so far as I am aware that they were in league with Moni Mohan and moreover no direct issue was raised on this point. Of course the burden is on a person dealing with a *pardanashin* woman like Hari Dasi to show that she understood the nature of the transaction and if the lady had given evidence and denied that she understood the contents of the power of attorney, matters would have stood on a different footing but when the lady does not venture to come forward as a witness and deny that she understood the document, although as appears from the order-sheet under date the 8th January, 1916, she had applied to be examined on commission, and you have the fact that her brother and cousin both of whom I must assume to be disinterested persons attested the document and the fact that the Subordinate Judge has found no evidence that the lady was colluding with the plaintiff, I am not prepared to hold that Hari Dasi must not be taken to have had full knowledge of the contents of the power of attorney.

With regard to the fourth point the third defendant contends that as he obtained his mortgage from Hari Dasi after she had sold the property under her attachment and herself purchased it the interest of defendant No. 2 in the property had gone and that as regards the decree, this being a money decree, the plaintiff's claim is barred. Moreover, he suggests that he had no notice of the mortgage and that in any case the plaintiff's security as regards the

decree was destroyed when Hari Dasi purchased the property at the sale under the attachment. I do not think that these contentions are well-founded. At the time of the mortgage the attachment of Hari Dasi was subsisting although the execution case in which it was made was struck off on the 27th January, 1904, but subsequently restored; the mortgagee were of the moneys due under the decree and of the benefits and advantages thereof (at least this is so far as three of the mortgages are concerned) with the result that the benefit of the attachment passed to the plaintiff. Now it would be strange indeed if as between the plaintiff and Hari Dasi the effect of her purchase was to discharge her liability, I think that upon her purchase the plaintiff had a lien on the property to the extent of what was due under the decree at the time of the purchase and that if the striking off of the execution case destroyed the attachment (which I am not deciding it did) then inasmuch as the property then was in Moni Mohan free from the attachment he had a charge on the property by virtue of his mortgages from Moni Mohan. This disposes of this point except as regards the question of notice. Now the mortgages were registered and accordingly I think that when defendant No. 3 took his mortgage he was put on enquiry with regard to the charges created by the plaintiff's mortgages and had notices of them by virtue of the registration.

The fifth point remains. The Subordinate Judge finds that the mortgages were taken by a Calcutta *dalal* taking advantage of the wretched condition of a drunkard often living in the houses of prostitutes and that the evidence as to passing of consideration is meagre and unsatisfactory.

Now the plaintiff's evidence is that he first came to know Moni Mohon some 10 days before the first mortgage was executed, and I cannot find that he was asked a single question in cross-examination as to his knowledge of Moni Mohan's manner of life, it is true that he was asked if he knew certain houses said to be prostitutes' houses frequented by Moni Mohan, but he denied knowledge of them and the subject was not pressed. Kanai Lal, the plaintiff's brother, who took a prominent part in the mortgage transactions stated that he first knew Moni Mohan some 5 days before the first loan, he denied that he had ever seen prostitutes at 7—17, Ram Bagan Lane, where he met Moni Mohan, but stated that he had heard Moni Mohan was a great drunkard; he also denied, knowing that No. 11, Ram Bagan Lane was a prostitute's house. But even assuming that Moni Mohan to the knowledge of the plaintiff was a drunkard and a frequenter of prostitutes' houses, I cannot see that

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that *per se* invalidates the mortgages if the power was executed by Hari Dasi with knowledge of its contents unless it is established by evidence that any money advanced under the mortgages was applied to the knowledge of the lenders for purposes foreign to the power, or unless it is established that Mani Mohan was in such a besotted condition when he executed the mortgages that he did not know what he was doing, and that the mortgage consideration either did not pass at all or at any rate not to the extent stated. Moni Mohan has not been called and to my mind this has not been established by the evidence and I do not think that from the circumstances of Moni Mohan's life I am entitled to draw the inferences which the Subordinate Judge has drawn.

I now come to consideration of the question whether there was consideration for the mortgages.

The first mortgage is attested by Mr. Bhupendra Nath Bose, a gentleman of position and well known attorney of this Court, he also apparently attested the passing of the consideration, part of which was paid by a cheque drawn by him in favour of Moni Mohan. Mr. Bose has been examined and, as is natural, giving evidence 13 years after the mortgage was executed, his knowledge of the transaction almost entirely depends upon what he gathers from seeing his name as an attesting witness. It is not suggested that he was a party to any fraud which may have been perpetrated and Moni Mohan has not denied that he received the consideration and admits receipt of the money in the body of the document. Kanai Lal the other attesting witness who is alive speaks to the consideration passing and to his getting the money from the plaintiff. The plaintiff was asked as to the source of the money and whilst it is true that his evidence is very vague as to all the transactions he did state that he had an account with the Delhi and London Bank and that the Pass Book for the period in question was at his house, and I infer that he means that he withdrew moneys on the occasion of each mortgage, he is not asked or even challenged to produce this Pass Book and under the circumstances I am not prepared to hold that the consideration for the first mortgage did not pass. A question of his kind must be decided upon the evidence on the record and not upon surmises and speculations which may or may not be correct: *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* (1).

The second mortgage is attested by Kanai Lal who says that he received the consideration money from the plaintiff and paid it to Moni Mohan and Moni Mohan has not been called to deny this.

(1) (1866) 11 M. I. A. 28 (43).

Kanai Lal took a prominent part in the transaction and may upon the evidence have provided the money and if matters stood there I should feel doubt whether on this evidence alone I should hold the passing of the consideration established, but Hari Nath Bannerjee, an attesting witness (described as Hem Chandra Bannerjee, in the document) and a clerk in Mr. B. N. Bose's office, speaks to the passing of the consideration and under these circumstances I think that I should hold that the consideration passed.

The passing of consideration for the third and fourth mortgages is proved by Kanai Lal alone and for the reasons stated above I am not prepared to accept his uncorroborated testimony even although Moni Mohan in the document admits receipt of the consideration and has not been called to deny it, and accordingly I think that the appeal fails with regard to these mortgages.

The fifth mortgage is proved by Kanai Lal alone, but this stands upon a different footing as the money was kept in deposit and paid out from time to time in various sums which appear in exhibit 6 by Kanai Lal in the office of Raj Kishore Basack. I think that accordingly under the circumstances proof should be required of the payment of these sums apart from the proof of the mortgage itself. Now the payments in exhibit 6 bear against them the signatures of the persons to whom they were paid or at whose directions they were paid and except the payments of Rs. 200 and Rs. 100, respectively, made on the 9th May and the 27th July bear against them the signature of Moni Mohan Roy, which has not been challenged. The item of Rs. 200 on the 9th May is satisfactorily proved by exhibit 9, and that of Rs. 100 on the 27th July is signed by J. Mukherjee for M. M. Roy; from the evidence of witness No. 8, for defendant No. 3, it appears that he worked under Hari Dasi. The result is that I think the passing of the consideration for the fifth mortgage is established.

It may seem at first sight inconsistent that I should accept Moni Mohan's signature for the moneys paid out from time to time under the fifth mortgage and not accept his admission of receipt of the money in the body of mortgages 3 and 4 followed by his signature to these documents, but the answer I think is that there is a well recognised way of proving a mortgage and if as here I do accept the proof offered the mortgage fails whereas other and different considerations apply to a mere receipt for moneys received from time to time.

It is urged on behalf of the defendant No. 3 that the plaintiff made no enquiry as to the purposes for which the money was wanted

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but it appears from the evidence of the plaintiff and of Kanai Lal that some enquiry was made, for the plaintiff states that Moni Mohan said he was looking after his wife's litigation and wanted money for it and Kanai Lal states that the loans were taken to pay debts for Government revenue due to Raj Kishore Basack from whom money for this purpose had been borrowed and for expenses of litigation and also to pay the September *kist* of 1903. And moreover I am inclined to think that when money is lent under circumstances like the present the lender is entitled to assume without enquiry that money is required for the purposes for which borrowing is empowered and that unless he has notice express or otherwise that the money will be used for purposes foreign to the power he is protected, but be that as it may, I think, upon the evidence in this case that if enquiry was necessary, that the enquiry made was sufficient. It would be casting an altogether undue burden on the lender to say that he must ascertain the amount of the *kist* to be paid and the cost of litigation and of course he is under obligation to see to the application of the money. I think for these reasons that the appeal should succeed so far as regards the first, second and fifth mortgages and the order I would make would be to declare a charge on the immovable properties comprised in these three mortgage bonds for the sums thereby secured together with interest thereon at the rates provided in the mortgages calculated as therein stated down to the date of this decree together with $\frac{2}{3}$ of the costs of the suit. The defendants to be entitled to redeem the premises upon payment of this amount at any time within three months from the date of this decree and if this sum is not paid within the time aforesaid the plaintiff to be entitled to bring the property to sale for the amount of the charge hereby declared with interest at 6 per cent. per annum on the decree with liberty to apply for a personal decree against defendants Nos. 1 and 2 in respect of any balance of the sum charged which is not realised by sale and against the defendant No. 3 for any part of the $\frac{1}{3}$rd costs not realised by the sale.

My learned brother does not however agree and accordingly in accordance with his judgment the appeal must fail.

TEUNON, J.—In the judgment delivered by my learned brother, which I have had the advantage of reading, the facts and the contentions before us have been fully set out and need not be repeated now.

I agree in the view taken by my learned brother on points 1 to 4, though on the 4th point I desire to add that in my opinion the

fact that certain execution proceedings were "struck-off" in no way affected the attachment referred to.

On the 5th point, relying on the evidence given by Mr. B. N. Bose, I accept though with some hesitation the view adopted by my learned brother, as regards the first of the fifth mortgage bonds, I fully agree in his opinion as regards the third bond and the fourth.

There remains the second bond of the 25th September, 1903, securing a sum of Rs. 1,000, and the fifth bond of 1st February, 1904, securing the sum of Rs. 5,000.

The second bond was executed only 13 days after the first which was also in respect of a sum of Rs. 1,000. In the case of the first bond the lender or the lender's brother took the precaution of securing Mr. B. N. Bose, as a witness and of making payment of a large part of the consideration by cheque. In the case of the second, 12 days later, they were content with the presence of a clerk, Hem Chandra or Hari Nath Banerjee on Rs. 30 a month, and pay the whole in notes. The two other attesting witness are Kanai Lal Pyne the brother of the lender Gopeswar, Raj Kishore Basak a broken down attorney who it was understood by Kanai was himself to receive Rs. 500 to Rs. 700 out of the Rs. 1,000 advanced. There is ample evidence from both sides that defendant No. 2 Moni Mohan was a drunkard, a ganja smoker, and a resident in prostitutes' houses. Kanai Lal, who himself is for all practical purposes the lender, is a broker apparently in the house agency business and is consequently active in litigation. It is not to be supposed that before the 25th of September he had not made enquiries and ascertained all particulars of his customer. It is true that neither Moni Mohan nor Hari Dasi has been examined. I am unable to attach importance to this for neither has now any subsisting interest in the property and neither of the contending parties could safely examine them. On the evidence adduced I am not satisfied that the consideration on this bond was advanced, it is a fair inference that if any small sums were given to Moni Mohan it was taken and knowingly given not for the benefit to Moni Mohan's principal Hari Dasi but for the purposes of Moni Mohan's profligacy.

Much the same considerations apply to the fifth bond. To this bond the attesting witnesses are the same Raj Kishore Basak, Kanai Lal and a third person Ajodhya Nath Mukerjee who has not been examined. It is the case however of the plaintiff that the consideration Rs. 5,000 though ostensibly paid to Moni Mohan was immediately handed back by him to Kanai, and thereafter paid out in driblets to Moni Mohan or to persons said to be his servants

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or agents on various dates ranging from 1st February to the 26th August. These payments were endorsed, it is said, on a certain agreement (Exhibit 6) on the dates of the several payments and Moni Mohan's signature (in two cases the signatures of the agent) thereafter taken against the entries. Now neither Moni Mohan nor his agents have been examined, and Raj Kishore Basak's day book in which the payments should have appeared has not been produced. In fact the only witness to these payments (except in the case of two items aggregating Rs. 300) is Kanai Lal himself. I cannot regard Kanai Lal as a witness of truth. As regards this bond, I should therefore hold that payment to the extent of Rs. 300 has been proved by the evidence of plaintiff's witness No. 6 and that as regards the rest payment has not been proved and that if any small sums were paid they were knowingly given to Moni Mohan for his own purposes.

By reason of the differing views we have taken and the provision of section 98 of the Civil Procedure Code this appeal must stand dismissed. We make no order as to the costs of this hearing.

Against this decision, the plaintiff preferred an appeal under clause 15 of the Letters Patent.

Babus Bepin Behary Ghose, Surendra Madhub Mullick and *Dwijenda Nath Mukerjee* for the Appellant.

Dr. Sarat Chandra Basak, Babus Makendra Nath Ray, Rishindra Nath Sarkar, Prokas Chandra Pakrasi and *Atul Chandra Dutt* for the Respondents.

The judgments of the Court were as follows :

April, 27.

Mookerjee, A. C. J.—This is an appeal under clause 15 of the Letters Patent in an appeal from original decree, wherein the Judges of the Division Bench were equally divided in opinion. Mr. Justice Teunon and Mr. Justice Greaves, who heard the appeal, were in agreement to some extent, but as they could not agree upon all the points, the judgment of the Subordinate Judge has been affirmed.

The suit is for the enforcement of five mortgage bonds which were executed by the first two defendants, Moni Mohun Roy and his wife Haridasi Debi, on the 12th September, 1903, the 25th September, 1903, the 18th November, 1903, the 8th December, 1903 and the 1st February, 1904. The sum advanced on each of the first four bonds is stated to have been Rs. 1,000, while the amount covered by the fifth bond is said to have been Rs. 5,000.

The properties covered by the successive mortgages are two, namely, *first*, a decree for money obtained by Haridasi Debi in the Court of the Subordinate Judge of Hughli on the 26th January, 1893, against Madhab Chandra Roy and others; and, *secondly*, a zemindari known as Gumukpota owned by Moni Mohun Roy. It is stated in the mortgage bonds that at the time when they were granted, the decree was already under execution and that the last step had been taken in June, 1903.

The plaintiff seeks to recover the sum due under these mortgages by sale of the zemindari. There is no claim for a personal decree; indeed, there could not be such a claim, as the suit was not instituted till the 6th September, 1915, long after the personal claim had become barred by limitation. The suit was not defended by either of the mortgagors, but objection was taken by the third defendant who claims to have acquired a good title to the zemindari by virtue of the transactions which we shall now mention. On the 31st may, 1905, the zemindari was mortgaged by Moni Mohun Roy to the third defendant. The usual mortgage decree was obtained on the 8th June, 1906, and at the execution sale which took place on the 23rd November, 1907, the property was purchased by the third defendant himself. In answer to the claim of the present plaintiff, the third defendant contends that no money was advanced under any of the five mortgages set up by him and that consequently he is not entitled to a decree for sale of the zemindari on the strength of what are no better than fictitious mortgages.

The Subordinate Judge held that payment of consideration had not been established with regard to any of the five mortgages, and dismissed the suit. Upon appeal to this Court; Mr. Justice Greaves has held that payment of consideration had been proved with regard to the first, second and fifth mortgages, while Mr. Justice Teunon has held that payment of consideration had been proved with regard to the first mortgage, and to the extent of Rs. 300 on the fifth mortgage. The position then was that as regards the first mortgage, both the learned Judges held in favour of the plaintiff upon the question of consideration. As regards the second mortgage, the two learned Judges were equally divided in opinion. As regards the third and fourth mortgages, both the learned Judges were against the plaintiff. As regards the fifth mortgage, the learned Judges were agreed that to the extent of Rs. 300 there was consideration, but as regards the remainder, they were divided in opinion. In these circumstances, the decree of the Subordinate Judge has been confirmed.

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It is plain that this decree is not in agreement with the view of either of the learned Judges, and it is also contrary to the course which was adopted in the case of *Mohunt Krishen Doyal Gir* v. *Irshad Ali Khan and Another* (1). The transactions were separate and independent, and if the learned Judges were agreed as to one or more of them, there is no reason why effect should not have been given to their view, merely because they disagreed as to another or the others. In so far as the learned Judges were agreed that there was consideration for the first mortgage, the decree of the Subordinate Judge should have been reversed. In so far as the learned Judges were agreed that there was no consideration for either the third or the fourth mortgage the decree of the Subordinate Judge should have been (as it was) confirmed. In so far as the learned Judges were agreed that there was consideration to the extent of Rs. 300 on the fifth mortgage, the decree of the Subordinate Judge should have been varied. The result of the dismissal of the entire suit is that an appeal has been preferred by the plaintiff with regard to the whole case. On the authority of the decision in *Heeranath* v. *Burm Narain* (2), approved in *Upendra Nath* v. *Bindakri* (3), the whole case is open in the appeal against the decree of dismissal of the entire suit; but, the plaintiff has, very wisely, refrained from asking us to review the findings of the two learned Judges in so far as they are in agreement. We are consequently not called upon, at the instance of the plaintiff, to consider the finding of the learned Judges upon the question of consideration for the third and fourth mortgages, nor have we been invited by the third defendant to investigate the question of consideration on the first mortgage, and, the payment of Rs. 300 on the fifth mortgage. Our conclusion consequently is that the suit has been rightly dismissed with regard to the third and fourth mortgages. As regards the second mortgage, we have to consider whether the view taken by Mr. Justice Teunon or that adopted by Mr. Justice Greaves is supported by the evidence. As regards the fifth mortgage, there should be a decree to the extent of Rs. 300: but we have to consider whether the evidence supports the claim of the plaintiff beyond that amount. As regards the first mortgage, the plaintiff will be entitled to a decree on the basis of the finding that there was consideration as alleged in the bond.

As regards the second mortgage, the evidence has been placed before us and we have arrived at the conclusion that the view taken

(1) (1915) 22 C. L. J. 525. (2) (1872) 17 W. R. 316.
(3) (1915) 22 C. L. J. 452 (462, 469).

by the Subordinate Judge and approved by Mr. Justice Teunon is correct. The evidence as to the payment of consideration has rightly been characterised as unsatisfactory. There is in reality no independent evidence, and we see no reason why the view of the Subordinate Judge should be disturbed. As regards the fifth mortgage, the matter is probably more doubtful. Mr. Justice Teunon has held that the evidence does not establish the payment of anything beyond a sum of Rs. 300. Mr. Justice Greaves has taken the contrary view, and has held that the payment of the entire sum has been proved. We have arrived at the conclusion that the view taken by Mr. Justice Teunon is correct and that there cannot be a decree for a larger sum than Rs. 300 on this mortgage. There is one important circumstance in connection with this transaction which cannot be overlooked. On the date of the execution of the mortgage, a deed of agreement also was executed. The bond purports to have been executed by Moni Mohun Roy on behalf of himself and his wife, and recites that the sum of Rs. 5,000 was made over to Moni Mohun Roy at the time of the execution of the document. The agreement, however, falsifies this recital: Under the agreement, Moni Mohun Roy left the sum in the hands of the mortgagee on condition that he would be allowed to take, out of the sum in deposit, such moneys as might be required for payment of arrears of rent, for the conduct of law suits and other purposes, from time to time. On the back of this agreement, there are various entries to the effect that on the dates specified certain sums were paid to Moni Mohun Roy. Mr. Justice Teunon has not accepted all these alleged payments, but he has held that two sums of Rs. 200 and Rs. 100 respectively which were paid to Mr. N. C. Bose, a solicitor of this Court for costs, are recoverable. We hold accordingly that the plaintiff is entitled to a decree for Rs. 1,000 on the basis of the first mortgage of the 12th September, 1903, with interest at the contract rate, and also to Rs. 300 on the fifth mortgage of the 1st February, 1904, with interest thereon at the rate mentioned in the bond.

The next question which requires consideration is, whether the zemindari in the hands of the third defendant is liable to be sold in execution of the decree on the mortgage. We are of opinion that the answer must be in the affirmative. At the time when these mortgages were executed the property was already under attachment; in other words, the wife, in execution of the decree for money which she held, had attached the property of her husband who had, in the course of events which need not be narrated in detail, become the

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legal representative of the judgment-debtors under that decree. The effect of the mortgage transactions, now under consideration, was that her right under the decree was given by way of security to the mortgagee who is the plaintiff appellant in this Court. Additional security was given by the husband in the shape of the zemindari under attachment. The true position then was that the property which was under attachment in execution of the money decree was, with the consent of the decree-holder and the judgment-debtor, given by way of security, to her mortgagee. No doubt there was a subsequent mortgage on the 31st May, 1905, which is the root of the title of the third defendant; but, at the sale in execution of the decree on the basis of that mortgage, the third defendant as purchaser could not claim a higher title than his mortgagor and that mortgagor was unquestionably bound by the mortgages of the 12th September, 1903, and 1st February, 1904. We must consequently hold that, notwithstanding the transactions that have taken place between the parties, the zemindari is liable to be sold in execution of any decree which may be made in the present litigation on the basis of the mortgages.

With regard to the fifth mortgage bond a point has been taken that the registration was invalid. It has been argued that as the bond was presented for registration by Moni Mohun Roy, and the power of attorney on the strength of which he purported to execute the document on behalf of his wife was not produced before the registering officer, the registration was illegal and void. We are of opinion that there is no substance in this contention. The document was executed by Moni Mohun Roy himself. He proposed thereby to bind not only his own interest in the property but also the interest of his wife; whether he could or could not effectually bind her interest would depend upon whether he had authority to bind his wife; that he had such authority is indisputable. But, apart from this, he was the sole executant of the document and he was competent to present it for registration. This view is supported by the decision in *Bissendoyal and Hurdoyal* v. *Ferdinand Schlaepfer* (1).

The result is that this appeal is allowed, and the decree of the Subordinate Judge varied. An account will be taken on the basis of the first mortgage of the 12th September, 1903 and the fifth mortgage of the 1st February, 1904; in respect of the latter mortgage, the consideration will be assumed to be Rs. 300. The usual mortgage decree will be drawn up in respect of the sum due to the plain-

(1) (1874) 22 W. R. 68.

tiff under these two transactions. The time for redemption will be six months from this date.

In view of the divergence of judicial opinion in this case we direct that each party do bear his own costs throughout the litigation.

Fletcher, J.—I agree.

Richardson, J.—I agree.

A. T. M. *Appeal allowed: Decree varied.*

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Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, Sir Ernest Edward Fletcher, Knight, Judge, and Mr. Justice Richardson.

PROMOTHA NATH PAL CHOWDHURY

v.

MOHINI MOHAN PAL CHOWDHURY AND ANOTHER.*

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Suit, maintainability of—Suit against the assignee of certified purchaser—Title of certified purchaser perfected, when Code of 1882 in force—Civil Procedure Code (Act XIV of 1882), Sec. 317—Civil Procedure Code (Act V of 1908), Sec. 66—Statute, construction of—Sale certificate.

The rule embodied in section 66 of the Code of Civil Procedure of 1908, is not applicable to an execution purchaser whose title was perfected when section 317 of the Code of Civil Procedure of 1882 was in force. Hence a real purchaser at an auction sale held on the 11th August, 1903, can bring a suit for a declaration of his title by purchase at a time when the Code of 1908 is in force, against an assignee of a certified purchaser, though not against the certified purchaser himself: *Dukhada v. Srimanti* (1) referred to.

Both sections 317 of the Code of 1882 and section 66 of the Code of 1908 operate to place a limitation upon the title of the purchaser, with this difference that the effect of section 66 is to widen the fetter placed upon the title of the purchaser by section 317.

The effect of section 66 of the Code of 1908 is to improve the position of the certified purchaser, and, in effect, to confer upon him a power of alienation he would not otherwise enjoy. If the certified purchaser alienated the property, the

* Letters Patent Appeal No. 2 of 1919 against the decision of Teunon and Greaves, JJ. dated the 4th February, 1919, in Appeal from Appellate Decree No. 2284 of 1916, against the decree of R. E. Jack, Esq., District Judge of Nadia, dated the 22nd June, 1916, affirming that of Babu Kali Kumar Sardar, Subordinate Judge of Nadia, dated the 23rd December, 1914.

(1) (1899) I. L. R. 26 Calc. 950.

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result, notwithstanding section 317 of the Code of 1882, would be that the title of the alienee could be forthwith defeated by the real owner. Under section 66 of the Code of 1908, the certified purchaser is enabled to confer a good title on the transferee, because the real owner is debarred from impeaching the title, not only of the certified purchaser but also of the person who has derived title from him.

The wider restriction embodied in section 66 of the Code of 1908 is not applicable to cases, where the title accrued under the Code of 1882.

Of things that do not appear and things that do not exist, the reckoning in a Court of law is the same; a title which cannot be proved against an opponent in the eye of law, has in point of fact no existence in relation to that individual.

Under section 317 of the Code of Civil Procedure of 1882, the auction purchaser had a title enforceable against the whole world except the certified purchaser. Under section 66 of the Code of 1908, the title of the real owner cannot be enforced against the certified purchaser as also against persons who claim a title derived from the certified purchaser.

Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed, must be deemed retrospective in its operation. The rule that enactments in a statute are generally to be construed to be prospective and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and, in the absence of clear words to that effect, a statute will not be construed so as to take away a vested right of action acquired before it was passed: *Manjhoori* v. *Akri* (1)

A sale certificate does not create title but is merely evidence of title: *Tantradhari* v. *Sundar Lal* (2) and *Braja Nath* v. *Joggeswar* (3).

Appeal by the Plaintiff.

Suit for a declaration of title.

The material facts appear from the judgment of Greaves, J.

The Division Bench, consisting of Teunon and Greaves, JJ., passed the following judgments:

1919.

February, 4.

Greaves, J.:—The plaintiff is the appellant in this appeal. His suit was for a declaration of his title to certain property and the District Judge of Nadia has held agreeing with the Subordinate Judge of Krishnagore that the suit is barred by section 66 of the present Civil Procedure Code. The appellant contends that this is not so and that section 66 has no application to his suit. The material facts are as follows. On the 4th or 11th August, 1903, the property in suit was purchased in the name of the defendant No. 1, the plaintiff's son, as the plaintiff alleges *benami*, at an auction-sale held in execution of a money-decree. The sale was, we are told, con-

(1) (1913) 17 C. L. J. 316 (345).
(2) (1907) 7 C. L. J. 384.
(3) (1908) 9 C. L. J. 346.

firmed on the 30th July, 1906 and a sale certificate issued to defendant No. 1 on the 24th April, 1909. In the month of March, 1911, defendant No. 1 agreed to sell the property to defendant No. 2 who commenced a suit for specific performance of the contract on the 9th August, 1912, as a result of which the defendant No 1 conveyed the property to defendant No 2 in September, 1912, with the result that the present suit was commenced on the 14th September, 1912. It is not, I understand, disputed that if the present Civil Procedure Code applies the suit is barred by section 66, but the appellant contends that his right of suit accrued prior to the coming into force of the present Code, and that section 317 of the old Code was no bar to the suit. I think that this is so if the old Code applies, see *Dukkada Sundari Dassi* v. *Srimonto Joardar* (1), and consequently the only question which arises on this appeal is whether the plaintiff's right of action accrued prior to the coming into force of the present Code on the 1st January, 1909. If it did I am disposed to agree with the contention urged on his behalf that having regard to section 6 of the General Clauses Act his right is not affected by the wider phraseology of section 66 as compared with section 317 of the old Code and indeed quite apart from the General Clauses Act this is only the general law. A statute is *prima facie* prospective and does not interfere with existing rights unless it contains clear words to that effect, or unless having regard to its object it necessarily does so, see *Lauri* v. *Renad* (2), and cases there cited. But I think the short answer is that no right of action accrued to the plaintiff (assuming for the moment that apart from section 66 he has a right of action) prior to March, 1911 and I fail to see how it can be said that he had any right of action before that date against defendant No. 2. To hold otherwise would be to deprive the defendant No 2 of the protection afforded him by section 66 on the strength of which he may have purchased. It is one thing to say that legislation unless expressly made retrospective shall not affect an existing vested right be it of suit or of some other right but it is quite another thing to say that the same principle applies to a possible right of suit which may arise *in futuro* which is not in my opinion a vested right at all.

The case of *Jackson* v. *Woolley* (3), was referred to in the course of the argument on behalf of the appellant and it is cited in *Gopeswar Pal* v. *Jiban Chandra Chandra* (4) upon which the appel-

(1) (1899) I. L. R. 26 Calc. 950.
(2) (1892) L. R. 3 Ch. 402 (421) and Halsbury's Laws of England Vol. 27 p. 159.
(3) (1858) 8 E. & B. 778. (4) (1914) 19 C. L. J. 549.

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lant also relies. Now *Jackson* v. *Wholly* (1) is considered in *Purdo* v. *Bingham* (2), and Lord Hatherly at page 740 of the report says of that case and of another case *Moon* v. *Durden* (3) to which he refers. "In each of those cases the person had acquired by positive act *inter partes*, a right of action, in the latter case, by a co-contractor having made a promise which of course the person had a right to rely upon as the law then stood as giving him a further six years for his remedy. And in *Moon* v. *Durden* (3) the person had actually brought an action before the statute passed and to hold the statute retrospective would have deprived him of a right which he had actually acquired; whereas in this case the creditor has not acquired by any act on the part of the debtor any new or fresh right."

In every case that I have been able to find in which a similar question has arisen there has always been some vested right and not as here a possible right to arise in *future*.

It is of course quite true that if the plaintiff's story is correct he had a vested right of action against defendant No. 1 from the date of the purchase until the sale certificate was issued on the 24th April, 1909, and if his right as against defendant No. 2 had then accrued I should agree that section 66 of the present Code was no bar, but I am unable to see that any right against defendant No. 2 accrued prior to March, 1911 and by that time the new Code was in operation. Under these circumstances for the reasons stated I think the appeal fails and should be dismissed with costs.

TEUNON, J.—In this case the material facts have been stated in the judgment just delivered by my learned brother, and it is unnecessary for me to repeat them.

I regret that I am unable to concur in the conclusion at which he has arrived.

We are agreed as I understand that for the reasons given by my learned colleague the provision of law primarily applicable is the provision to be found in section 317 of the Code of Civil Procedure, XIV of 1882. We are further agreed that on the allegations of the plaintiff, the latter had a vested right of action against defendant No. 1 from the date of the purchase.

We differ as to the position of defendant No. 2. In my opinion if defendant No. 2 took with notice of plaintiff's claim the delay made by defendant No. 1 in taking out his sale-certificate cannot

(1) (1858) 8 E. & B. 778. (2) (1869) L. R. 4 Ch. 735.
(3) (1848) 2 Ex. 23.

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place defendant No. 2 in a better or more advantageous position than he would have occupied under the Code of 1882.

In this view in my opinion this appeal should be decreed and the case remanded for trial on the merits.

Under the provisions of section 98(2) of the Code in accordance with the opinion of Greaves, J., this appeal must be dismissed with costs.

Against this decision, the plaintiff appealed under clause 15 of the Letters Patent.

Babus Sarnatul Chunder Dutt and *Monmotha Nath Pal* for the Appellant.

Babus Makendra Nath Ray and *Rupendra Kumar Mitter* for the Respondents.

The judgments of the Court were as follows :

APRIL, 27.

Mookerjee, A. C. J.:—This is an appeal under clause 15 of the Letters Patent in an appeal from appellate decree, wherein the two Judges of the Division Court have been equally divided in opinion upon an important question of law, namely, whether the rule embodied in section 66 of the Civil Procedure Code, 1908, is applicable to an execution purchaser whose title was perfected when section 317 of the Civil Procedure Code, 1882, was in force.

The plaintiff instituted this suit for a declaration of his title by purchase at an execution sale held on the 11th August, 1903; his case is that he purchased the property in the name of his son who is the first defendant in this litigation. The sale was confirmed under sections 314 and 316 of the Code of 1882, on the 30th July, 1906. The sale certificate, however, was not taken out till the 24th April, 1909; but the title of the purchaser accrued, under section 316, from the date of the confirmation of the sale, that is, from the 30th July, 1906, which must be taken to be the date of the sale certificate. This sale certificate sets out the name of the recorded purchaser as the purchaser of the property. The first defendant, the recorded purchaser, appears to have subsequently contracted to sell the property to the second defendant, with the consequence that in a litigation between the two defendants the second defendant obtained a decree for a conveyance by the first defendant, in his favour. As the plaintiff was not made a party to that suit, he now seeks a declaration that the first defendant was not the real purchaser and that the second defendant has not acquired any title to the disputed property under his conveyance. The suit has been

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dismissed on the ground that it is barred under the provisions of section 66 of the Civil Procedure Code of 1908.

The plaintiff now contends that section 66 of the Code of 1908 has no application, and that the rights of the parties are governed by section 317 of the Code of 1882, which was in force at the time when the execution sale took place and was confirmed. The sale-certificate, as we have already pointed out, was granted on the 24th April, 1909, after the Code of 1908 had come into force ; but it has not been contended, and, in our opinion, it could not be seriously contended that the delay in the issue of the certificate could in any way affect the position of the parties. A sale-certificate, it is well-established, does not create title, but is merely evidence of title ; *Tantradhari* v. *Sundar Lal* (1) ; *Braja Nath* v. *Jogeswar* (2). The sale, which is the root of the alleged title of the plaintiff, took place when the Code of 1882 was in force. Section 316 of that Code provides as follows :—

" When a sale of immovable property has become absolute in manner aforesaid, (that is, as provided in section 314), the Court shall grant a certificate stating the property sold and the name of the person who, at the time of sale, is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale ; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate, and not before : Provided that the decree under which the sale took place was still subsisting at that date."

Under this provision, the title of the purchaser became absolute on the date of the confirmation of the sale, that is, on the 30th July, 1906. That title, however, was subject to the limitation embodied in section 317, which provides as follows :—

" No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims." Consequently, the title acquired could not be enforced against the certified purchaser on the ground that he was not the real purchaser. We must bear in mind in this connection that it had been held by this Court in the case of *Dukkada Sundari* v. *Srimanta Joardar* (3), that section 317 which imposes a restriction upon the right of the owner to enforce his title, should be strictly construed, and that, consequently, such title could be enforced

(1) (1907) 7 C. L. J. 384. (2) (1908) 9 C. L. J. 346.
(3) (1899) I. L. R. 26 Calc. 950.

against an assignee of the certified purchaser. though not against the certified purchaser himself. The same view was adopted in the case of *Thayyanlan* v. *Kochan* (1), and *Sibia Kunwar* v. *Bhagoli* (2). The position, then, is clear that at the time when the plaintiff acquired his title by purchase at the execution sale, he was subject to the restriction embodied in section 317, that is, he had a title enforceable against the whole world except the certified purchaser. When, however, the Code of 1908 came into force on the 1st January, 1909, section 317 of the Code of 1882 was replaced by section 66 of the new Code which introduced a restriction of a much wider scope. Sub-section (1) of section 66 is in these terms: "No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims." Consequently, under the new Code, the title of the real owner cannot be enforced against the certified purchaser as also against persons who claim a title derived from the certified purchaser. The question thus arises, whether, in these circumstances, the wider restriction embodied by the legislature in section 66 of the Code of 1908 can be applied to cases where the title accrued under the Code of 1882, and was, at the time of its inception, subject only to the restriction contained in section 317 of that Code. In our opinion, the answer must be in the negative.

It is manifest that the respondent seeks to read into the Code of 1882, section 66 of the Code of 1908, or, in other words, to give retrospective operation to the latter provision of the law. This contention is opposed to well recognised canons for the interpretation of statutes. As was observed in *Munjkoori* v. *Akal* (3), "every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability, in respect of transactions or considerations already passed, must be deemed retrospective in its operation." "The rule that enactments in a statute are generally to be construed to be prospective and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice"; "and it has been repeatedly laid down that in the absence of clear words to that effect, a statute will not be construed so as to take away a vested right of action acquired before it was

(1) (1897) I. L. R. 21 Mad. 7. (2) (1899) I. L. R. 21 All. 196.
(3) (1913) 17 C. L. J. 316 (345).

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passed" ; *Budhu Koer* v. *Hafiz* (1) ; *Gopeswar* v *Jiban Chandra* (2). But the respondent has argued that section 66 of the Code of 1908, like section 317 of the Code of 1882 embodies merely a rule of procedure, and that as no litigant has a vested interest in the course of procedure, the new statute does not in fact take away a vested right. In our opinion, this contention is based upon a narrow and superficial view of the true effect of section 66 of the Code of 1908 and section 317 of the Code of 1882. Each of these provisions no doubt finds a place in a code of procedure ; but each imposes in essence a serious restriction upon the title of the real purchaser at the execution sale. As has been well observed, of things that do not appear and things that do not exist, the reckoning in a Court of law is the same ; a title which cannot be proved against an opponent in the eye of law, has in point of fact no existence in relation to that individual. It is consequently indisputable that both section 317 of the Code of 1882 and section 66 of the Code of 1908 operate to place a limitation upon the title of the purchaser, with this difference that the effect of section 66 is to widen the fetter placed upon the title of the purchaser by section 317. If we look at the matter from a different stand-point, the effect of section 66 is to improve the position of the certified purchaser, and in effect to confer upon him a power of alienation he would not otherwise enjoy. If the certified purchaser alienated the property, the result, notwithstanding section 317, would be that the title of the alienee could be forthwith defeated by the real owner. Under section 66, on the other hand, the certified purchaser is enabled to confer a good title on the transferee, because the real owner is debarred from impeaching the title, not only of the certified purchaser but also of the person who has derived title from him. In our opinion, there can be no doubt that the view taken by Mr. Justice Teunon is correct and that the decree made by the District Judge cannot be upheld.

The result is that this appeal is allowed, the decree made by the District Judge set aside and the case remitted to the Court of first instance to be tried on the merits, on fresh evidence to be adduced by both parties.

A question has been raised as to whether the person who obtained leave to prosecute the appeal after the death of the original plaintiff is really competent to do so. That question will be left open for consideration by the trial Court. The counter affidavit

(1) (1913) 18 C. L. J. 274.

(2) (1914) 19 C. L. J. 549 ; I. L. R. 41 Calc. 1125.

which has been filed here, will be transmitted to the Court below as part of the record.

The appellant is entitled to his costs of this appeal, of the appeal before the Division Bench and also before the District Judge. The costs in the Court of first instance will abide the result of the retrial.

Fletcher, J.—I agree.

Richardson, J.—I agree.

A. T. M. *Appeal allowed; Case remanded.*

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Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, and Sir Ernest Edward Fletcher, Knight, Judge.

CHANDI CHARAN MITRA

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Pleader, suspension of—Misconduct—Criminal prosecution not likely to succeed—Legal Practitioners Act (XVIII of 1879), Sec. 15 (f).

Although there is no inflexible rule that there must in every case be a trial and conviction for criminal misconduct before disbarment will be ordered, that should be the ordinary rule, where the misconduct alleged has no direct connection with the conduct of the pleader in his practical and immediate relation to the Court. Where the misconduct attributed indicates unfitness to discharge professional duties, a criminal conviction may not always be a pre-requisite to the adoption of disciplinary measures; and, indeed, notwithstanding acquittal on the criminal charge, disciplinary measures may be successfully taken: *In the matter of Second Grade Pleaders* (1). The test to be applied in each case is, whether the person concerned will be prejudiced by the adoption of summary procedure for the investigation of what is in reality a grave criminal charge.

The rule deducible from *Anon* (2); *Anon* (3); *Anon* (4); *Stephens* v. *Hill* (5) is as follows: An attorney will be struck off the roll if convicted of felony or if convicted of a misdemeanour involving want of integrity, even though the judgment be arrested or reversed for error; and also, without a previous conviction, if he is

* Reference No. 1 of 1920, by J. Johnston, Esq., District Judge of Rungpur, dated the 17th January, 1920.

(1) (1910) I. L. R. 34 Mad. 29. (2) (1834) 5 B. & Ad. 1088.
(3) (1838) 3 Nev. & Per. 389. (4) (1833) 2 Dowl. P. C. 110.
(5) (1842) 10 M. & W. 28; 62 R. R. 517.

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guilty of gross misconduct in his profession or of acts which, though not done in his professional capacity, gravely affect his character as an attorney; but in the latter case, if the acts charged are indictable and are fairly denied, the Court will not proceed against him until he has been convicted by a jury; and will in no case compel him to answer under oath to a charge for which he may be indicted.

Reference under section 14 of the Legal Practitioners Act.

Proceedings were taken against Babu Chandi Charan Mitter, a pleader practising in the Rungpur Courts, under section 13 (f) of the Legal Practioners Act for misconduct set out in the order of reference by the District Judge of Rungpur to the Hon'ble High Court, an extract from which is given below :—

Extract from the order of reference by Mr. J. Johnston, District Judge, Rungpur, dated 17th January, 1920.

"It was also ingeniously contended on behalf of the accused pleader in this Court that inasmuch as the act of which he has been found guilty amounts to a criminal offence and that as at one time in the course of the proceedings, I expressed the opinion that a criminal prosecution would not be successful I am as it were estopped from recommending that he should be suspended or dismissed under the Legal Practitioners Act. In this connection reliance has been placed upon a case, *In the matter of Nil Kunt Biswas* (1), where it was held that evidence which does not suffice for a conviction on a criminal charge cannot justify the removal of a large legal practitioner from his profession. But the present case is clearly distinguishable from the reported case inasmuch as in the reported case the opinion of the subordinate Court was its final and fully considered opinion expressed in submitting the proceedings to the High Court and evidently accepted by the High Court whereas it would be absurd to argue that any opinion of mine expressed at a preliminary stage in the proceedings must necessarily be adhered to throughout. However the point is of no real importance since the final decision regarding the sufficiency or otherwise of the evidence either for an order of suspension or dismissal in these proceedings under the Legal Practitioners Act or for a criminal prosecution rests not with this Court but with the High Court.

"It might be suggested, although the suggestion has not been seriously made before me, that if the finding of the learned Munsiff as regards the third charge is believed to be correct, it is the duty of this Court to direct that the accused pleader should be criminally

(1) (1868) 9 W. R. Cr. 29.

prosecuted for an offence under section 477 of the Indian Penal Code and that these proceedings should abide the result of the criminal prosecution. This was undoubtedly the view taken by the Calcutta High Court in a somewhat similar case *In re Gunesh Chunder Gangolly* (1), but nevertheless the principle therein laid down is not, I venture to think, of absolutely universal application. In this connection I would refer to the later case of *Ghulab Khan, Mookhtear* (2), where the muktear concerned was dismissed by the Calcutta High Court under the Legal Practitioners Act for a reasonable cause, viz., for having instigated the commission of a serious dacoity, notwithstanding that he had been acquitted by the Sessions Judge when he was charged with that offence; and I would thus submit that although as matters have turned out the charges against the accused ought to have been investigated in the criminal Courts in the first instance it is not absolutely necessary that this course should now be followed if their Lordships are of opinion that the accused pleader be adequately dealt with under the Legal Practitioners Act. It has been pointed out in a case, *In the matter of Second Grade Pleaders* (3), dealing with two second grade pleaders under the Act that according to the law in England a solicitor may be punished by suspension or by striking off the roll where the misconduct is in character criminal though no indictment has been preferred; and if that principle be held to be applicable to this country it constitutes an additional reason for holding that the accused need not necessarily be put to the expense of defending himself in a criminal trial especially as the trial would in all probability have to be held in a different district and would thus seriously interfere with the work of this Court and moreover its result would not be wholly decisive as regards the present proceedings under the Legal Practitioners Act. I have unfortunately been unable to discover any later decisions of the Calcutta High Court in which the principle enunciated in the case of *In re Gunesh ChunderGangolly*(1). has been referred to or commented upon but in the recent case of *Re Hari Prasanna Mukherjee, Muktear* (4), the accused was proceeded against under the Legal Practitioners Act for what was apparently the criminal offence of receiving money from a certain person for the purpose of bribing the police and acting as a go-between and if their Lordships consider that sufficient cause has been made out the same procedure may be followed in this instance also."

(1) (1870) 13 W. R. 456.
(2) (1871) 7 B. L. R. 179.
(3) (1910) I. L. R. 34 Mad. 29.
(4) (1917) 21 C. W. N. 516.

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Babus Dasarathi Sanyal, Ramtaran Chatterjee and *Atul Chandra Gupta* for the Pleader.

Babus Dwarka Nath Chucherbutty (*Government Pleader*) and *Surendra Nath Guha* in support of the Reference.

The judgments of the Court were as follows :

Mookerjee, A. C. J.:—This is a Reference under section 14 of the Legal Practitioners Act, by the District Judge of Rungpur, in the matter of Babu Chandi Charan Mitter, a pleader practising in the Rungpur Courts. Proceedings were taken against the pleader under section 13 (f) of the Legal Practitioners Act for misconduct set out in three formal charges as follows :—'*first*, that taking advantage of his position as a pleader, he, between the dates 17th to 20th September, 1919 or thereabouts offered bribes to the record-room staff to cause the disappearance of a word which was in all probability either দৈবর বৃত্তি or দৈবর কৃত from a deed, dated the 25th of Aswin, 1135 B. S. executed by one Rajaram Nandi in favour of one Santiram Bairagi ; *secondly*, that he attempted to remove the said word from the document between the dates 17th to 20th September, or thereabouts ; and, *thirdly*, that in all probability he caused the disppearance of the said word from the document between the dates 17th to 20th September, or thereabouts.'

It is plain that the charges thus formulated, if established, show that the pleader has been guilty of grave criminal offences. Indeed, at one stage the District Judge considered whether criminal prosecution should not be commenced against the pleader ; but he came to the conclusion that the evidence available was of such a character that a criminal prosecution was not likely to be successful. He accordingly directed the institution of proceedings under the Legal Practitioners Act. We are of opinion that this was not the appropriate procedure to follow in the circumstances of this case. It was pointed by Sir Lawrence Jenkins, C. J. *In the Matter of an Attorney* (1), that, where on an application by an aggrieved party to have an attorney struck off the rolls of attorneys, on the ground of professional misconduct, there was a positive sworn denial of the misconduct by the attorney coupled with an explanation which was not demonstrably false, even a strong case of suspicion would not justify disciplinary action against the attorney on a summary proceeding. This view is substantially in agreement with the opinion expressed by Mr. Justice Louis Jackson in *In the Matter of Nilkunt Biswas* (2). In that case Mr. Justice Jackson observed

(1) (1913) I. L. R. 41 Calc. 113. (2) (1868) 9 W. R. 29 Cr.

that the matter alleged against the mookhtar, in fact, amounted to a criminal offence; it seemed to be admitted by the Magistrate that the evidence would not have sufficed for a conviction and he did not think that it could be said that evidence which would not support a conviction on the criminal charge would justify a removal from the profession. It is not necessary to lay down an inflexible rule that there must in every case be a trial and conviction for criminal misconduct before disbarment will be ordered. That should be the ordinary rule where the misconduct alleged has no direct connection with the conduct of the pleader in his practical and immediate relation to the Court. On the other hand, where the misconduct attributed indicates unfitness to discharge professional duties, a criminal conviction may not always be a pre-requisite to the adoption of disciplinary measures; and, indeed, notwithstanding acquittal on the criminal charge, disciplinary measures may be successfully taken, as in the case of *In the matter of Second Grade Pleaders* (1). The test to be applied in each case is whether the person concerned will be prejudiced by the adoption of summary procedure for the investigation of what is in reality a grave criminal charge. There can be no doubt that if the procedure followed in the present case were approved, the result might be an obvious injustice to the person concerned. If a criminal prosecution had been instituted against the pleader, he would have had the benefit of a trial by jury, and might conceivably have been acquitted, as indeed was apprehended by the District Judge. In such circumstances, summary proceedings under the Legal Practitioners Act should not have been adopted. The view we take is supported by cases of high authority; *Anon* (2); *Anon* (3); *Anon* (4); *Stephens* v. *Hill* (5). The rule deducible from these cases may be briefly stated. An attorney will be struck off the roll if convicted of felony or if convicted of a misdemeanor involving want of intergrity, even though the judgment be arrested or reversed for error; and also without a previous conviction, if he is guilty of gross misconduct in his profession or of acts which, though not done in his professional capacity, gravely affect his character as an attorney; but in the latter case, if the acts charged are indictable and are fairly denied, the Court will not proceed against him until he has been convicted by a jury; and will in no case compel him to

(1) (1910) I. L. R. 34 Mad. 29.
(2) (1834) 5 B. and Ad. 1088.
(3) (1838) 3 Nev. & Per 389.
(4) (1833) 2 Dowl P. C. 110.
(5) (1842) 10 M. & W. 28; 62 R. R. 517.

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answer under oath to a charge for which he may be indicted. A similar view has been approved by the Supreme Court of the United States, *Exp Wall* (1).

We are clearly of opinion that this Reference must be discharged and the *ad interim* order of suspension cancelled.

Fletcher, J.—I agree.

A. T. M. *Reference discharged.*

(1) (1882) 107 U. S. 265.

[This decision was followed in Reference No. 2 of 1920 decided by Mookerjee, A. C. J and Fletcher, J. on the 12th May, 1920.—Rep.]

CRIMINAL REVISION.

Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, and Sir Ernest Edward Fletcher, Knight, Judge.

CRIMINAL.
1920.
April, 22, 23.

RAMSAHAY RAM AND OTHERS

v.

KING-EMPEROR.*

Rioting—Criminal Procedure Code (Act V of 1898), Sec, 403 (2)—Acquittal, previous—Trial, second, on same facts, if legal—Indian Penal Code (Act XLV of 1860), Sec, 141—Unlawful assembly—Common object—Humiliating intervening person.

Under sub-section (2) of section 403 of the Criminal Procedure Code, a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1). The true test is, not so much whether the facts are the same in both trials as whether the acquittal on the first charge necessarily involves an acquittal on the second charge: *R. v. Barron* (1) referred to.

Where A and B were previously tried for an offence under section 342 of the Indian Penal Code:

Held, that they could still be tried for an offence under section 147 of the Indian Penal Code, though the acts constituting the offences formed the same

* Criminal Revision No. 145 of 1920, against the decision of L. R. Fawcus, Esq., Additional Sessions Judge of Howarh, dated the 3rd February, 1920, affirming that of I. J. Drummond, Esq., District Magistrate of Howrah, dated the 12th January, 1920.

(1) (1914) 2 K. B. 570; 10 Cr. App. Rep. 81.

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transaction within the meaning of sub-section (1) of section 235 of the Code of Criminal Procedure.

An assembly of five or more persons is designated an "unlawful assembly," within the meaning of third clause of section 141 of the Indian Penal Code, where the common object is not to arrest persons who committed an offence, but to subject to humiliation persons who intervened on behalf of the offenders.

Application for revision under section 435 of the Code of Criminal Procedure by the Accused.

The accused (7 persons) were convicted of rioting under section 147 of the Indian Penal Code and sentenced to two months rigorous imprisonment each.

Mr. Langford James, *Babus Mukund Bihari Mallik* and *Nirmalratna Ghosh* for the Petitioners.

Mr. Orr (*Deputy Legal Remembrancer*) and *Babu Narendra Kumar Bose* for the Crown.

C. A. V.

The judgments of the Court were as follows :

May, 13.

Mookerjee, A. C. J.:—This Rule was issued on the application of seven constables who had been convicted of rioting under section 147, Indian Penal Code and sentenced to two months rigorous imprisonment each. The Rule calls upon the District Magistrate of Howrah to show cause why the convictions and sentences should not be set aside. Eleven grounds were set out in the petition ; two of these were overruled by the Bench which granted the Rule ; these raised questions of identification and severity of sentence. The other grounds have been summarised in the course of the argument before us under four heads, namely, first that the first two petitioners, Ramsahay Ram and Taluka Singh, have been tried in contravention of the provisions of section 403 (1) Criminal Procedure Code ; secondly, that there is no legal evidence on which any common object could at all be found ; thirdly, that the common object found is not supported by the evidence, and, fourthly, that the common object found is not the common object mentioned in the charge. Before we examine these points, it is necessary to recapitulate briefly the facts as found by the Courts below.

Mr. Bankimkrishna Ghosh, Executive Engineer in charge of the Brahmani Division in Orissa, has a house on the Sibpur road in the town of Howrah. On the 2nd July, 1919, two female hawkers took up their position with their baskets on the front step of the house ; a third woman took up her place at the point where a private lane

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belonging to Mr. Ghose enters the public road. A constable, by name Murabbi Singh, came up and demanded pice from the hawkers. They refused to pay and were supported in this by two persons Rishikesh Ghosh and Amulyaratan Sarkar; the latter took down the number of the constable. An altercation thereupon ensued; Mr. Ghose came out of the house and asked what the matter was. The constable stated that the women were liable to arrest for selling vegetables on the public road. Mr. Ghose dissented, as according to him the hawkers were seated on his private property. He however told the constable that if he thought that the hawkers had committed an offence, he might arrest them, but that he need not create a disturbance. On this, the constable, aided by the fifth and seventh petitioners, Ramasis Singh and Raghuram who were constables in plain clothes, seized the hawkers' goods, loaded them on a passing cart and took them as far as the Grand Trunk Road. Raghuram then went off to the Sibpur Police Station and reported to the Senior Sub-Inspector that Murabbi Singh and Ramasis Singh were being assaulted as they had shifted some hawkers from the public road. The Sub-Inspector thereupon sent off a party of constables, including the rest of the petitioners, with orders to arrest the offenders and to bring them to the police station. The Sub-Inspector also deputed the junior Sub-Inspector to accompany the constables; the junior Sub-Inspector demurred at first but finally followed the party. On the way to the house of Mr. Ghosh, the constables were joined by Murabbi Singh and Ramasis Singh, and the whole party then proceeded to the spot shouting some words among which one could catch the expression "Numberwallah Babu." When the party reached the house, they found at the doorway Pasupati Ghose, the son of Mr. Ghose. Murabbi Singh called out "this is one of them," whereupon the other constables hit him with sticks and proceeded to arrest him. The boy struggled and clung on to the door-leaves. His father came out at that moment and appears to have caught his arm with a view to prevent his arrest. There was a struggle in the course of which the Head Constable and Taluka Singh struck Mr. Ghose with sticks and finally father and son were both arrested and marched off to the police station. A neighbour Hemanta Kumar Pal asked what the matter was; he was at once taken into custody by Ramasahay Ram. A little further on, Brajendralal Datta, brother-in-law of Mr. Ghose, turned up and asked the same question. He was forthwith arrested by Taluka Singh. Two other neighbours Kaladhan Ganguli and Lalbihari Basu were also taken into custody,

because Brajenda Lal Datta asked them to go and lay a complaint in Court. On arrival at the police station, the officer in charge took a written statement from Mr. Ghose while Murabbi Singh laid a counter information. These facts have been amply established by the evidence which has been accepted as true by Mr. Drummond, the District Magistrate who tried the case in the first instance and by Mr. Fawcus, the Additional Sessions Judge who heard the appeal against the convictions. There is no reason to doubt that the facts have been correctly found by the Courts below and we have only to consider whether on these facts the convictions can be sustained.

The first point urged is that inasmuch as Ramsahay Ram and Taluka Singh had been previously tried on the same facts, they could not be tried again under section 403 (1), Criminal Procedure Code. This contention has been overruled by the District Magistrate as also by the Sessions Judge. It appears that Hemanta Kumar Pal instituted a case against Ramsahay Ram for wrongful confinement under section 342, Indian Penal Code. Ramsahay Ram was acquitted after trial on the 19th August, 1919. Similarly BrajendraLal Datta instituted a case for wrongful confinement under section 342, Indian Penal Code, against Taluka Singh who was acquitted after trial on the 14th August, 1919. In these circumstances, the contention has been put forward that these acquittals bar the present trial of the two accused mentioned. This argument is plainly not well-founded. The case is covered not by sub-section (1), but by sub-section (2) of section 403 which provides that a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1). That section lays down that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence. In the case before us, Ramsahay Ram and Taluka Singh were previously tried in respect only of the actual arrests made by them. Consequently, even if we assume that the whole series of acts from the arrest of Pasupati Ghose in the house to the arrest of Kaladhan Ganguli and Lal Bihari Basu in the public street formed the same transaction, within the meaning of section 235 (1), the two petitioners Ramsahay Ram and Taluka Singh, who had been previously tried for an offence under section 342, Indian Penal Code, could still be tried for an offence under section 147, Indian Penal Code. The decision in *Suresh Chandra* v.

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Banku (1), does not militate against this view, as the facts of that case attracted the operation of, not sub-section (2) but sub-section (1) of section 403. The true test is, as Lord Reading observed in *R.* v. *Barron* (2), not so much whether the facts are the same in both trials as whether the acquittal on the first charge necessarily involves an acquittal on the second charge. We are clearly of opinion that the present trial is not vitiated by contravention of the rule embodied in section 403, sub-section (1). The first ground must consequently be overruled.

The remaining grounds may be conveniently considered together, as they all raise the question of common object which is an essential element of the offence of rioting under section 146, Indian Penal Code. The charge specified the common object as "wrongfully to confine Babu Bankim Krishna Ghose, Pasupati Ghose and others." The District Magistrate found that the alleged common object had been established by the evidence. The use of the expression "numberwallah Babu" showed that the feelings of the constables had been aroused against the person who had taken down Murabbi Singh's number, as also against his associates. The common object thus was not to arrest persons who had committed an offence, but to subject to humiliation those gentlemen who had intervened on behalf of the vegetable-sellers. This clearly brings the case within the third clause of section 141, Indian Penal Code. The evidence on the record abundantly supports the concurrent conclusion of the District Magistrate and the Sessions Judge on this point.

As a last resort, it has been faintly suggested that the accused are entitled to the benefit of section 79, Indian Penal Code, which provides that nothing is an offence which is done by any person, who is justified by law, or who, by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes himself to be justified by law, in doing it. This argument is based on the assumption that the petitioners merely acted as in obedience to the orders of the officer in charge at the police station who directed them to go and arrest certain offenders. We are of opinion that there is no foundation for this contention. The seventh petitioner Raghuram, as we have seen, went off to the police station and gave the entirely unfounded information that Ramasis Singh and Murabbi Singh were being assaulted because they had shifted some hawkers from the public road. The Sub-Inspector thereupon sent the constables to arrest

(1) (1905) 2 C. L. J. 622.

(2) (1914) 2 K. B. 570; 10 Cr. App. Rep. 81.

the offenders. They met Murabbi Singh and Ramasis Singh on the way, who had been neither obstructed nor assaulted while engaged in the performance of their duties. In this connection, it is important to bear in mind that the allegation that the two constables had been assaulted was wholly false, and the District Magistrate found that the marks of injury on their persons had been artificially caused. The constables who were sent out to arrest the alleged assailants of Murabbi Singh and Ramasis Singh could not be said to have acted in good faith within the meaning of section 79, Indian Penal Code, that is, to have acted with due care and attention as required by section 52, Indian Penal Code, when they proceeded to arrest the "numberwallah Babu." Their manifest intention was not to arrest the supposed assailants of their colleagues, but to harrass persons who had quite lawfully taken down the number of Murabbi Singh with a view to report his conduct to his superior officers. In our opinion, the accused are not entitled to the protection afforded by section 79, Indian Penal Code.

The real grievance of the petitioners is that some other persons jointly tried with them have been acquitted by the District Magistrate. The cases of those persons are not before us, and we cannot pronounce an opinion upon the question, whether on the evidence an unduly favourable view has or has not been taken so far as they are concerned. But, as regards the petitioners, we feel no doubt whatever that they have been rightly convicted. Indeed, the evidence discloses a surprising set of incidents, which one would otherwise have thought, were not likely to happen in the neighbourhood of Calcutta. A constable, appointed presumably to keep the peace, attempts to extort money from three women vegetable-sellers; they have the courage to withstand the demand, with the result that an altercation ensues, and a gentleman present at the place takes down the number of the constable. This infuriates the constable, who, along with two other constables, seizes the goods, places them on a passing cart, takes them away, and has false information sent to the police station that the constables had been assaulted because they had attempted to shift some hawkers from the public road. A large party of constables is forthwith sent off to arrest the alleged offenders. The constables enter the house of a highly respectable citizen, who holds an important post in Government service, assault him and his son, arrest them and march them off to the police station. Gentlemen of the locality who can muster courage to enquire what had happened, are forthwith arrested and are also marched off to the police station. The complainant, after considerable difficulty, is

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able to secure an enquiry by order of this Court which ultimately results in a conviction. It is manifest that but for the public-spirited insistence of the complainant, the grave misconduct of the police officers concerned would never have been successfully investigated. We agree with the Sessions Judge that "there was no semblance of discipline in the behaviour of the constables," and if there is anything to urge in this case against the sentences, it is clearly not their severity but their inadequacy.

The Rule is accordingly discharged. The petitioners will be called upon to surrender and to serve out the remainder of the sentences.

Fletcher, J.—I agree.

A. T. M. *Rule discharged.*

FULL BENCH.

Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, Sir Ernest Edward Fletcher, Knight, Judge, Sir Nalini Ranjan Chatterjea, Knight, Judge, Mr. Justice Teunon, and Sir Asutosh Chaudhuri, Knight, Judge.

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1920.

April, 26.
May, 20.

HRIDOY NATH RAY AND OTHERS

v.

RAM CHANDRA BARNA SARMA AND OTHERS.*

Jurisdiction—Jurisdiction, exercise of—Erroneous action of Court in exercise of jurisdiction—Civil Procedure Code (Act V of 1908), O. 23, R. 1—Order for withdrawal of suit—Order not within the scope of the rule—Order, if valid—Fresh suit with leave, if competent—Court trying subsequent suit, if competent to enter into question of legality of order.

An order for withdrawal of a suit with leave to institute a fresh suit, made under order 23, rule 1 of the Code of Civil Procedure, but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction; such order is consequently not null and void.

A fresh suit instituted upon leave so granted is not incompetent.

* Full Bench Reference in Appeal from Appellate Decree No. 1313 of 1917, against the decision of Babu Haridas Basu, Additional Subordinate Judge of Dacca, dated the 27th March, 1917, reversing that of Babu Manindra Prasad Sinha, officiating Munsiff of Manikganj, dated the 4th January, 1916.

The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order.

Kali Prasanna v. *Panchanan* (1) over-ruled.

Jurisdiction may be defined to be the power of a Court to hear and determine cause, to adjudicate or exercise any judicial power in relation to it: *Sukh Lal* v. *Tara Chand* (2): in other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value, and nature of the subject-matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants. This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is of a fundamental character. Given such jurisdiction, one must be careful to distinguish *exercise* of jurisdiction from *existence* of jurisdiction; for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.

The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction, should be included in the conception of jurisdiction itself, is sometimes a question of great nicety.

In order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination. A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it: *Rukhmani* v. *Ganada* (3).

Jurisdiction does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly: *Malharjun* v. *Narhari* (4).

There is a clear distinction between the jurisdiction of the Court to try and determine a matter, and the erroneous action of such Court in the exercise of that jurisdiction. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the Court does act. The

(1) (1916) 23 C. L. J. 489; 20 C. W. N. 1000.
(2) (1905) I. L. R. 33 Calc. 68 (71); 2 C. L. J. 241.
(3) (1914) 20 C. L. J. 213 (217); 19 C. W. N. 84.
(4) (1900) I. L. R. 25 Bom. 337 (347); L. R. 27 I. A. 216.

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boundary between an error of judgment and the usurpation of a power is this: the former is reversible by an appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity.

When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect.

A Court may have the right and power to determine the status of a thing and yet may exercise its authority erroneously; after jurisdiction attaches in any case, all that follows is exercise of jurisdiction, and continuance of jurisdiction is not dependent upon the correctness of the determination.

Appeal by the Plaintiffs.

Suit for recovery of possession of land upon declaration of title.

The Court of first instance found in favour of the plaintiffs upon the questions of title and possession and decreed the suit. Upon appeal, the Subordinate Judge affirmed the findings of the trial Court as to title and possession, but dismissed the suit on the ground that a previous suit, instituted in respect of the same subject-matter, had been improperly withdrawn under order 23, rule 1 (2) of the Code of Civil Procedure, on the authority of *Kali Prasanna* v. *Panchanan* (1). A second appeal by the plaintiffs came on for hearing before Chaudhuri and Walmsley, JJ., who, disagreeing with the ruling in *Kali Prasanna* v. *Panchanan* (1), made the following order of reference to the Full Bench.

Order of Reference.

1919.

May, 5.

The plaintiffs obtained a decree in a previous suit against the defendants for the land in the present suit, from which there was an appeal. At the hearing of the appeal, the plaintiffs applied for leave to withdraw that suit, with liberty to bring a fresh suit, which was granted. The present suit was then instituted. It was decreed by the trial Court, but the decree has been set aside by the first appellate Court on the ground that the order, which gave leave to the plaintiffs to withdraw the former suit with liberty to institute a fresh one, was made without jurisdiction, as there was nothing in the nature of a formal defect to remedy. This point was not taken before the trial Court, but only at the appellate stage. Both the Courts have found in favour of the plaintiffs so far as their title is concerned and also on the question of limitation. The learned Subordinate Judge has, however, held that the present suit does not lie,

(1) (1916) 23 C. L. J. 489; 20 C. W. N. 1000.

basing his judgment upon the case of *Kali Prasanna Sil* v. *Panchanan Nandi* (1).

We understand that in several cases in this Court, the correctness of the ruling in *Kali Prasanna's case* (1) has not been accepted. We also understand that there are several appeals now pending which depend upon that ruling.

The learned Judges in *Kali Prasanna's case* (1), have held that they are bound to follow *Kharda Co., Ld.*, v. *Durga Charan Chandra* (2), and *Mabulla Sardar* v. *Rani Hemangini Debi* (3), in both of which it was held that clauses (a) and (b) of sub-rule (2) of section 373, Civil Procedure Code (1882), corresponding to order 23, rule 1 Civil Proced ure Code, (1908), have to be read together and that a ground included in clause (b) must be of the same nature as the ground specified in clause (*a*), that is to say, it must be something of the same nature as *formal defect*. They hold that if there is no such defect, an order for withdrawal with permission to institute a fresh suit is one made without jurisdiction, and the fresh suit should be treated as barred by *res-judicata*.

We should like to point out that an order made under the above section or Order has been held to be not appealable. See *Jogodindro* v. *Sarut Sundari* (4), and *Abdul Hossein* v. *Kasi Saku* (5). Opinion has varied as to whether it is open to revision. This Court has held in *Bansi Singh* v. *Kishun Lall* (6), that it is not—the learned Judges being of opinion that section 115, Civil Procedure Code, is not applicable unless *a case has been decided*. In *Rajendra* v. *Atal Bihari* (7), the learned Judges held that this Court had ample authority under section 107 of the Government of India Act, 1915, to set aside an order made by the Subordinate Judge, when made without affording opportunity to the opposite party to contest an application for withdrawal.

In *Kharda Co., Ld.* v. *Durga Charan* (2), the learned Judges held that the order for withdrawal was "irregularly or improperly made," and it was competent to the Court to interfere by way of revision. They did not say the order was made without jurisdiction, and that it was, therefore, null and void.

In *Rajendra* v. *Atal Bihari* (7), the Court considered that the order for withdrawal had been "improperly" made and not as without jurisdiction.

(1) (1916) 23 C. L. J. 489; 20 C. W. N. 1000.
(2) (1909) 11 C. L. J. 45.
(3) (1910) 11 C. L. J. 512.
(4) (1891) I. L. R. 18 Calc. 322.
(5) (1899) I. L. R. 27 Calc. 362.
(6) (1913) I. L. R. 41 Calc. 632.
(7) (1916) 25 C. L. J. 456.

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In *Hriday Nath Parai* v. *Akshay Lal Chaudhuri* (1), the learned Judges held that an order for withdrawal cannot properly be made on the ground that the plaintiff had failed to produce evidence in support of his claim. They read the cases above cited as supporting that view. In *Bai Kashibai* v. *Shidapa Annapa* (2), such an order (one in similar circumstances as the above) was held to have been made with material irregularity in the exercise of the Court's jurisdiction.

Krishnan, J., in *Kamayya* v. *Papayya* (3), holds that there is no question of defect of jurisdiction, though such an order may amount to an irregularity, and he dissents from the view expressed in *Kali Prasanna* v. *Panchanan* (4). The same view is practically taken in *Tirupati* v. *Muttu* (5).

In *Perumal* v. *Karupan* (6), it was held that the propriety of the order could not be questioned in the second suit. The same view is also taken in *Chhajju* v. *Khyali Ram* (7).

It has also been held, in *Kannuswami Pillai* v. *Jagathambal* (8), that a similar order was made without the proper exercise of judicial discretion and, therefore, with material irregularity in the exercise of jurisdiction. Sadasiva Ayyar, J., also held in that case that the doctrine of *ejusdem generis* had been pushed too far. He did not agree with the view, taken in *Kharda Co., Ltd.* v. *Durga Charan* (9), and *Mabulla* v. *Hemangini* (10), that "other sufficient grounds" mean grounds analogous to a formal defect.

There seems, therefore, a general agreement amongst Judges that such an order as that dealt with in *Kali Prasanna* v. *Panchanan* (4), is not without jurisdiction and, therefore, null and void, but as "improperly or irregularly" made. We take the same view. If the Court has jurisdiction and decides wrongly or improperly, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the order, however wrong, cannot certainly be disturbed or disregarded by a Court of equal jurisdiction. There are numerous cases on this point amongst which *Malkurjun* v. *Narhari* (11), may be referred to.

(1) (1916) 25 C. L. J. 454.
(2) (1913) I. L. R. 37 Bom. 682.
(3) (1916) I. L. R. 40 Mad. 259 (264).
(4) (1916) 23 C. L. J. 489; 20 C. W. N. 1000.
(5) (1888) I. L. R. 11 Mad. 322.
(6) (1919) 21 M. L. J. 574.
(7) (1913) 9 All. L. J. 378.
(8) (1918) I. L. R. 41 Mad. 701.
(9) (1909) 11 C. L. J. 45.
(10) (1910) 11 C. L. J. 512.
(11) (1910) I. L. R. 25 Bom. 337 (347).

In *Sheikh Golam Sarwar* v. *Joylal Mondol* (1), the learned Judge appears to have adopted the language used in *Kali Prasanna* v. *Panchanan* (2), about jurisdiction, but inasmuch as there have been dissentient views taken by several Judges of our Court, and several appeals are now pending, depending upon the ruling in *Kali Prasanna* v. *Panchanan* (2), and as the weight of authority seems to us to be against the view taken in it, we think that although the appeal before us is one of small value, the question ought to be referred to a Full Bench.

In this connection, we think we ought to refer to the observations made by Sadasiva Ayyar, J., in *Kannuswami* v. *Jagathambal* (3), as regards the question whether the words "other sufficient grounds" in clause (*b*), order 23, rule 1 (2), must be of the same nature as the ground specified in clause (*a*). We are inclined to agree with the view taken by that learned Judge, and in this connection, we may also refer to the case of *Mussamut Khatoon Koonwar* v. *Hurdeo Narain Singh* (4), in which the plaintiff was permitted in appeal to the High Court to withdraw his suit with permission to bring a fresh action, as the Court considered that the plaintiff ought to produce better evidence on the question of value. It was not a case of formal defect. In this connection, we may also refer to the case of *Koomar Poresh Narain Roy* v. *Ranee Surut Soondure Debee* (5).

This appeal is referred for the final decision of a Full Bench with special reference to the following questions:—

(1) If an order for withdrawal of a suit with leave to institute a fresh suit be made under order XXIII, rule I, Civil Procedure Code (or section 373 of Act X, 1877)* but on a ground not of the same nature as "formal defect" mentioned in clause (*a*), can it be treated as an order made without jurisdiction and, therefore, null and void?

(2) Is a fresh suit instituted upon such leave incompetent?

(3) Is the Court trying the subsequent suit competent to enter into the question whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit, had jurisdiction to make such an order?

(4) Is such an order open to revision under section 115, Civil Procedure Code?

(1) (1919) 23 C. W. N. 18. (2) (1916) 23 C. L. J. 489; 20 C. W. N. 1000.
(3) (1918) I. L. R. 41 Mad. 701 (704 to 706).
(4) (1873) 20 W. R. 165. (5) (1871) 16 W. R. 100.

* [S. 373 of Act XIV of 1882—Rep.]

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May, 20.

Babus Prakas Chandra Pakrasi, *Nil Kanta Ghose*, and *Ramendra Mohan Majumdar* for the Appellants.

Babu Ramesh Chandra Sen for the Respondents.

C. A. V.

The judgments of the Court were as follows:

Mookerjee, A. C. J.—The suit which has culminated in this reference was instituted by the appellants for recovery of possession of land upon declaration of title. The Court of first instance found in favour of the plaintiffs upon the questions of title and possession and decreed the suit. Upon appeal, the Subordinate Judge affirmed the findings of the trial Court as to title and possession, but dismissed the suit on the ground that a previous suit, instituted in respect of the same subject matter, had been improperly withdrawn under order 23 rule 1 (2). In support of this view, the Subordinate Judge relied upon the decision in *Kali Prasanna* v. *Panchanan* (1), which is an authority for the proposition that where the appellate Court allows a plaintiff to withdraw from a suit on the ground that he had not been able to adduce all the evidence which should have been adduced, the order is without jurisdiction, and a fresh suit brought in pursuance of that order is barred by *res judicata*. In the previous litigation, it appears, the plaintiffs succeeded in the primary Court. Upon appeal by the defendants, the following order was recorded by the Subordinate Judge on the 18th September, 1913:

"Heard both parties and appellants' objection. The plaintiff respondent applies to withdraw from suit with liberty to bring fresh suit. There appears reason. The plaintiff filed a chitta dated 1246 B.S.; his case is that the disputed land is covered by that chitta as belonging to him. That chitta was not compared or relaid in the locality and the identity was not established; the oral evidence is not sufficient. I therefore allow the suit to be withdrawn and permit the plaintiff to bring fresh suit, if not otherwise barred, on condition of his paying appellants' costs in both the Courts before institution of fresh suit. Appeal thus disposed off."

The present suit was thereafter instituted on the 2nd April, 1914, and was, as already stated, decreed by the trial Court, where no objection was taken by the defendants that it was barred by reason of the alleged incompetence of the order in the previous suit. The objection was taken in the lower appellate Court for the first time, as the decision in *Kali Prasanna* v. *Panchanan* (1), had been meanwhile pronounced and published. The Subordinate Judge enter-

(1) (1916) 23 C. L. J. 489; 20 C. W. N. 1000.

tained and gave effect to the objection, which he described as a technical ground not taken in the lower Court. On second appeal to this Court, the Division Bench has dissented from the view taken in *Kali Prasanna* v. *Panchanan* (1), and has referred the following questions for decision by a Full Bench :

"(1) If an order for withdrawal of a suit with leave to institute a fresh suit be made under order XXIII, rule 1, Civil Procedure Code (or section 373 of Act X, 1877) but on a ground not of the same nature as "formal defect" mentioned in clause (2), can it be treated as an order made without jurisdiction and, therefore, null and void ?

(2) Is a fresh suit instituted upon such leave incompetent ?

(3) Is the Court trying the subsequent suit competent to enter into the question, whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit, had jurisdiction to make such an order ?

(4) Is such an order open to revision under section 115, Civil Procedure Code."

Order 23, rule 1 mentioned in the first of these questions is in the following terms :

"(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others."

The case has been argued before us on the assumption that the order for withdrawal in the previous litigation was improperly made.

(1) (1916) 23 C. L. J. 489.

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The contention of the appellants is that even on the assumption that the order was improperly made, it is conclusive between the parties, because however erroneous it might be deemed to have been, it cannot rightly be regarded as made without jurisdiction. The contention of the respondents, on the other hand, is that as the Subordinate Judge in the previous litigation, invoked the aid of order 23, rule 1 (2) under circumstances not contemplated thereby, the order, in so far as it reserved liberty to the plaintiffs to institute a fresh suit must be deemed to have been made without jurisdiction and consequently null and void, with the inevitable result that under sub-rule (3) the plaintiffs are precluded from instituting the present suit. The question thus emerges for consideration, whether an order for withdrawal of a suit, with liberty reserved to the plaintiffs to institute a fresh suit in respect of the same subject-matter, is an order made without jurisdiction, if it is passed under circumstances not contemplated by order 23, rule 1 (2). The answer to this question depends upon an analysis of the notion of jurisdiction of a Court.

In the order of reference to a Full Bench in the case of *Sukh Lal* v. *Tara Chand* (1), it was stated that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it; in other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. An examination of the cases in the books discloses numerous attempts to define the term "jurisdiction," which has been stated to be "the power to hear and determine issues of law and fact"; "the authority by which judicial officers take cognizance of and decide causes"; "the authority to hear and decide a legal controversy"; "the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them"; "the power to hear, determine and pronounce judgment on the issue before the Court;" "the power or authority which is conferred upon a Court by the legislature to hear and determine causes between parties and to carry the judgments into effect;" "the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution." (Reference may in this connection be made to the discussion of the nature of jurisdiction in the judgments of this Court in *Ashutosh* v. *Behari* (2). and *Gurdeo* v.

(1) (1905) I. L. R. 33 Calc. 68 (71); 2 C. L. J. 241.

(2) (1907) I. L. R. 35 Calc. 61; 6 C. L. J. 320.

Chandrikah (1). This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value, and nature of the subject-matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants. This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction; for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction, should be included in the conception of jurisdiction itself is sometimes a question of great nicety, as is illustrated by the decisions reviewed in the order of reference in *Sukh Lal* v. *Tara Chand* (2), and *Khosh Mahomed* v. *Nasir Mahomed* (3); See also the observation of Lord Parker in *Raghunath* v. *Sundar Das* (4). But the distinction between existence of jurisdiction and exercise of jurisdiction has not always been borne in mind and this has sometimes led to confusion. (See *Mabulla* v. *Hemangini* (5); *Moser* v. *Marsden* (6), where the term jurisdiction is used to denote the authority of the Court to make an order of a particular description). We must not thus overlook the cardinal position that in order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination. A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to

(1) (1907) I. L. R. 36 Calc. 193; 5 C. L. J. 611.
(2) (1905) I. L. R. 33 Calc. 68 (71, 72); 2 C. L. J. 241.
(3) (1905) I. L. R. 33 Calc. 352 F. B.; 2 C. L. J. 259 F. B.
(4) (1914) I. L. R. 42 Calc. 72 (83); 20 C. L. J. 555; L. R. 41 I. A. 251.
(5) (1910) 11 C. L. J. 512. (6) (1892) 1 Ch. 487.

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determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it: *Rashmoni* v. *Ganada* (1).

Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. As an authority for this proposition, reference may be made to the celebrated dictum of Lord Hobhouse in *Malkarjun* v. *Narhari* (2): "A Court has jurisdiction to decide wrong as well as right; if it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken, the decision however wrong cannot be disturbed." Lord Hobhouse then added that though it was true that the Court made a sad mistake in following the procedure adopted, still in so doing the Court was exercising its jurisdiction; and to treat such an error as destroying the jurisdiction of the Court was calculated to introduce great confusion into the administration of the law. The view that jurisdiction is entirely independant of the manner of its exercise and involves the power to decide either way upon the facts presented to the Court, is manifestly well founded on principle, and has been recognised and applied elsewhere: *Exp. Watkins* (3); *Heaven* v. *Pater* (4). There is a clear distinction between the jurisdiction of the Court to try and determine a matter, and the erroneous action of such Court in the exercise of that jurisdiction. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the Court does act. The boundary between an error of judgment and the usurpation of power is this: the former is reversible by an appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity. When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Were it held that a Court had jurisdiction to render only correct decisions, then each time it made an erroneous ruling or decision, the Court would be without jurisdiction and the ruling itself void. Such is

(1) (1914) 20 C. L. J. 213 (217); 19 C. W. N. 84.
(2) (1900) I. L. R. 25 Bom. 337 (347); L. R. 27 I. A. 215.
(3) (1833) 7 Peter 568. (4) (1886) 120 U. S. 464.

not the law, and it matters not what may be the particular question presented for adjudication, whether it relates to the jurisdiction of the Court itself or affects substantive rights of the parties litigating, it cannot be held that the ruling or decision itself is without jurisdiction or is beyond the jurisdiction of the Court. The decision may be erroneous, but it cannot be held to be void for want of jurisdiction. A Court may have the right and power to determine the status of a thing and yet may exercise its authority erroneously; after jurisdiction attaches in any case, all that follows is exercise of jurisdiction, and continuance of jurisdiction is not dependent upon the correctness of the determination.

It follows from these principles that when a Court of competent jurisdiction has made an order under order 23, rule 1 (2) in circumstances not contemplated by the rule, the order cannot be deemed to have been made without jurisdiction. The Court has jurisdiction to try the suit, and in the exercise of that jurisdiction is competent to make an order for withdrawal with liberty reserved to the plaintiff to institute a fresh suit in respect of the same subject-matter, if it is satisfied that circumstances exist which justify such an order. The Court is so satisfied rightly or wrongly; as the Subordinate Judge in the previous suit put it quaintly, "there appears reason." The Court accordingly makes the order. It is plain that however erroneous the order may be, it is not an order made by a Court without jurisdiction; it is, on the other hand, an order made by a Court of competent jurisdiction acting with material irregularity in the exercise of its jurisdiction. The order cannot consequently be deemed null and void. The party aggrieved may directly impugn the order, and may, in an appropriate proceeding, invoke the aid of a superior tribunal to set aside the order, as appears to have been done in the cases brought to our notice, except the case of *Kali Prasanna* v. *Panchanan* (1), but till it has been so vacated, it is operative between the parties and cannot be ignored or challenged collaterally in a different proceeding. There is thus no escape from the position that the decision in *Kali Prasanna* v. *Panchanan* (1), cannot be defended on principle. That decision, indeed, has been doubted on more than one occasion, as pointed out in the Order of Reference. Besides the cases mentioned therein, reference may particularly be made to the judgment of Srinivasa Ayyangar, J., in *Tulsaram* v. *Gopal* (2), where the true rule was stated to be that if a Court has jurisdiction to try a suit and has authority to pass orders of a particular kind, the fact that it has passed an order which

(1) (1916) 23 C. L. J. 489. (2) (1916) 32 M. L. J. 434.

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it should not have made in the circumstances of that litigation, does not indicate total want or loss of jurisdiction so as to render the order a nullity.

The first three questions referred to the Full Bench must consequently be answered in the negative; the fourth question does not arise and has not been argued before us. The result is the following series of propositions:

(1) An order for withdrawal of a suit with leave to institute a fresh suit, made under order 23, rule 1, but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction; such order is consequently not null and void.

(2) A fresh suit instituted upon leave so granted is not incompetent.

(3) The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order.

These propositions leave no room for doubt that the decision of the Subordinate Judge in this case must be set aside and the decree of the Court of first instance restored with costs in all the Courts, including the costs of the hearing before the Full Bench and the Division Bench.

Fletcher, J.:—I agree.

Chatterjea, J.—I agree.

Teunon, J.—I agree.

Chaudhuri, J.—I agree.

A. T. M. *Appeal allowed.*

Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, Sir Ernest Edward Fletcher, Knight, Judge, Sir Nalini Ranjan Chatterjee, Knight, Judge, Mr. Justice Teunon, and Sir Asutosh Chaudhuri, Knight, Judge.

NORENDRA NATH KOER

v.

BHUSAN CHANDRA PAL.*

CIVIL.
1920.
April, 26.

Suit, maintainability of—Suit for damages—Unlawful interference with the exercise of property rights—Instituting civil action, maliciously and without reasonable and probable cause.

A person, who unlawfully interferes with the exercise of the property rights of another, commits an act in the nature of trespass to property, and is liable for damages in an action for trespass: *Bhut Nath* v. *Chandra Binode* (1) approved.

No suit lies for damages against a defendant for maliciously and without reasonable and probable cause, instituting a civil action: *Bisham* v. *Wyatt* (2) and *Mohini* v. *Surendra* (3) approved.

Appeal by the Plaintiff.

Suit for damages for wrongful attachment of chattels belonging to the plaintiff and wrongful detention thereof in Court.

The lower appellate Court held that the defendant was liable for damages in respect of the detention, but the suit was dismissed as barred by limitation. The plaintiff preferred a second appeal, which came on for hearing before Sir Lancelot Sanderson, Chief Justice and Mr. Justice Duval, who made the following order of reference to the Full Bench.

Reference.

CIVIL.
1919.
August, 22.

Sanderson, C. J.—This is an appeal by the defendant, B. C. Pal, from the judgment of the Subordinate Judge sitting in appeal at Alipur.

The suit was brought by the plaintiff, N. N. Koer, to recover damages for alleged wrongful attachment of certain chattels belonging to the plaintiff and alleged wrongful detention thereof in Court.

* Full Bench Reference No. 5 of 1919, in Appeal from Appellate Decree No. 707 of 1917, against the decision of Babu Bhagabati Charan Kundu, 4th Subordinate Judge of 24-Parganas, dated the 8th January, 1917, modifying that of Babu Jagadish Chandra Goswami, 1st Munsiff at Sealdah, dated the 31st August, 1915.

(1) (1912) 16 C. L. J. 34. (2) (1911) 14 C. L. J. 515.
(3) (1914) I. L. R. 42 Calc. 550; 21 C. L. J. 68.

CIVIL.

1910.

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Sanderson, C. J.

In 1908 the defendant obtained a money decree against the father and brother of the plaintiff and in execution thereof, he attached certain chattels, including those in question in this suit, on the 22nd January, 1911.

The plaintiff filed a claim in the execution case, alleging that the chattels, which were attached, belonged to him. On the 1st April, 1911, the plaintiff's claim was allowed in part, and an order was made that the chattels, the subject matter of this suit, which were then in the custody of the Court, should be released from the attachment. On the 3rd April, 1911, the defendant brought a suit in pursuance of order 21, rule 63, against the plaintiff, N. N. Koer, his father, his wife and his brothers, to establish the plaintiff's father's title to the chattels.

On the same day, the defendant obtained an order *nisi* in that suit, for a temporary injunction to restrain the plaintiff from removing the chattels from the custody of the Court.

The plaintiff showed cause why the order should not be made absolute, and the Court ordered that the chattels should be delivered to the plaintiff on his furnishing security.

The plaintiff failed to give security and the injunction, therefore, became effective. On the 31st May, 1912, the defendant's suit was dismissed, the Court holding that the chattels belonged to the plaintiff. On the 18th June, 1912, the plaintiff took possession of the chattels.

The defendant appealed against the decree of the 31st May, 1912, and the appeal was dismissed on the 7th May, 1913.

The present suit was brought on the 22nd January, 1914.

The defence that the suit was barred by the Indian Limitation Act, 1908, was not taken in the lower Courts: it was, however, raised in this Court, and it was agreed by the learned vakil for the plaintiff that this Court was bound to entertain and consider the point and give effect to the law of limitation.

The plaintiff alleged that the defendant was actuated by malice, but both the lower Courts held that the attachment was made by the defendant in the *bona fide* belief that the chattels belonged to the defendant's judgment-debtors and that there was no malice on the part of the defendant.

There is no finding that as regards the defendant's suit against the plaintiff and others, there was a want of reasonable and probable causes. The plaintiff alleged that the causes of action in this suit arose on the 22nd January, 1911, (i.e., the day on which the attachment was made), on the 1st and 3rd April, 1911, the 31st May,

1912, and the 7th May, 1913. The 1st of April, 1911, is the day on which the plaintiff's claim was allowed in part in the execution case; the 3rd April, 1911, is the day on which the defendant instituted his suit against the plaintiff and others, for a declaration that the chattels belonged to his judgment-debtors, and obtained the order *nisi* for a temporary injunction.

The 31st May, 1912, is the day on which the defendant's suit was dismissed and the 7th May, 1913, is the day on which his appeal was dismissed.

The detention of the chattels in consequence of the original attachment of the 22nd January, 1911, came to an end on the 1st April 1911, when the plaintiff's claim, as regards the chattels, the subject matter of this suit, was allowed, and as regards this period of two months and eight or nine days, the defendant does not dispute that there was a trespass to the goods: his only defence in respect thereof is the Limitation Act. It was admitted on behalf of the plaintiff that the attachment was a wrongful seizure of movable property under legal process. Consequently, article 29 of the schedule to the Limitation Act applies to this part of the case; the period of limitation is one year, and it would begin to run from the date of the seizure, *viz.*, the 22nd January, 1911.

It was contended, however, on behalf of the plaintiff that the trespass which began on 22nd January, 1911, was a continuing one until the 31st May, 1912, when the defendant's suit was dismissed, and that the period of limitation would not begin to run until the last mentioned date.

In our judgment this contention cannot be accepted. But for the judicial order of the Court on the 3rd April, 1911, the plaintiff would have been able to obtain possession of his goods at any time after the order of release on the 1st April. From the date of the Court's order on the 3rd April, 1911, possession of the chattels was taken out of the hands of the defendant, and the possession became the possession of the Court. The detention caused by reason of the said order cannot be regarded as detention by the defendant. It is to be noted that the plaintiff himself alleged that a fresh cause of action accrued on the 3rd April, 1911.

It was further argued on behalf of the plaintiff that in any event article 36 was applicable, and that the misfeasance, which was relied upon, was the objection of the defendant to allow the plaintiff to remove the goods from the Court; but as pointed out by Jenkins, C. J., in *Madras Steam Navigation Co. Ld.* v. *Shalimar Works*

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Ld. (1), it is a rule of construction that a general article does not govern where there is a particular article which covers the case. Article 29 is specific and fits this case. Consequently, in our judgment the plaintiff's claim in respect of the trespass to the chattels, and the detention caused thereby during the period from the 22nd January, 1911, to the 1st or 3rd April, 1911, is barred by reason of article 29 of the Limitation Act, the seizure having taken place on the 22nd January, 1911, and this suit not having been instituted until the 22nd January, 1914.

The question which arises upon the plaintiff's claim for damages for the detention of the goods during the period from the 3rd April, 1911, until the 31st May, 1912, *i.e.*, from the institution of the defendant's suit to its dismissal, is whether the plaintiff's suit is maintainable.

It was contended on behalf of the defendant that the detention of the goods during this period was by reason of a judicial order of the Court, made in the suit brought by the defendant against the plaintiff and others, and that unless it was proved that the defendant had acted with malice and without reasonable and probable cause in instituting such suit and obtaining the injunction, the plaintiff could not succeed in respect of such detention in this suit, even though he had sustained damage through the detention of his goods.

On behalf of the plaintiff, reliance was placed on the case of *Bhut Nath Pal Mistry* v. *Chandra Binode Pal Chowdhury* (2).

The lower appellate Court based its judgment upon the above-mentioned case, saying that it was therein held "that a person, when he unlawfully interferes with the exercise of the property rights of another, commits an act in the nature of trespass to property, and is liable in an action for trespass; it is not necessary for the plaintiff in such a case to prove any malice or the want of any reasonable or probable cause," and the Court held the defendant liable for damages in respect of the detention during the period from the 22nd January, 1911, to the 18th June, 1912. The 18th June, 1912, is the date on which the plaintiff obtained possession of the goods It does not appear why that date was taken, having regard to the fact that the suit was dismissed on the 31st May, 1912, and presumably the plaintiff could have got his goods at any time thereafter. But the point is a small one, and as far as the main question is concerned, it does not matter whether the period is taken from the 3rd April, 1911, to the 31st May, 1912, or from the 3rd April, 1911, to the 18th June, 1912.

(1) (1914) I. L. R. 42 Calc. 85 (108). (2) (1912) 16 C. L. J. 34.

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In our judgment the decision in the abovementioned case is applicable to the present case, and the question arises whether the abovementioned case, *Bhut Nath* v. *Chandra Binode* (1), was rightly decided.

The decision seems to have been largely based upon the case of *Clissold* v. *Cratchley* (2).

But in that case, the plaint showed that there were alternative causes of action: the action was in part for maliciously issuing process and alternatively for trespass. The judgment was based on trespass. At the time when the execution was levied on the plaintiff's goods, the judgment against the plaintiff had been fully satisfied, and there was no longer a judgment in existence which would support the writ of execution. The writ of execution, based upon a satisfied judgment, was null and void, and, therefore, the seizing of the plaintiff's goods by the defendant was a trespass.

In the case of *Bhut Nath* v. *Chandra Binode* (1), there was no actual entry upon, or interference with, the plaintiff's property by the defendant, and it is somewhat difficult to see what constituted the alleged trespass. Further, any interference with the "property rights" of the plaintiff, which did take place, was by reason of the injunction, which was a judicial order of the Court made in the suit, brought by the defendant against the plaintiff, and which was in force during the time of the alleged interference, even though the injunction was subsequently discharged.

The decision in *Bhut Nath* v. *Chandra Binode Pal Chowdhury* (1), does not seem to be consistent with the principles involved in other decisions of this Court, *viz.*, *Joykalee Dassee* v. *The Representative of Chandmalla* (3); *Wilson* v. *Kankya Sahoo* (4); *Soobjan Beebee* v. *Shaikh Shureetoollah* (5); *Raj Chunder Roy* v. *Shama Soondari Debia* (6), (it should be noted that in the head note of the report of this case, the words "maliciously and" are wrongly omitted: see the judgment); *Madras Steam Navigation Company* v. *Shalimar Works Limited* (7); *Mohini Mohan Misser* v. *Surendra Narayan Singh* (8). The dictum of Lord Watson in *Kissorimohun Roy* v. *Harsukh Das* (9), and the decision in *Nanjana Chettiar* v. *Ganapathi Goundeh* (10) also seem to

(1) (1912) 16 C. L. J. 34.
(2) (1910) 2 K. B. 244.
(3) (1868) 9 W. R. 133.
(4) (1869) 11 W. R. 143.
(5) (1869) 12 W. R. 329.
(6) (1879) I. L. R. 4 Calc. 583.
(7) (1914) I. L. R. 42 Calc 85.
(8) (1914) I. L. R. 42 Calc. 550; 21 C. L. J. 68.
(9) (1889) L. R. 17 I. A. 17 (27); I. L R. 17 Calc. 436 (442).
(10) (1911) I. L. R. 35 Mad. 598.

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be inconsistent with the decision in *Bhut Nath* v. *C. B. Pal Chowdhury* (1).

We are of opinion that inasmuch as the detention of the plaintiff's goods from the 3rd April, 1911, until the 31st May, 1912, was by reason of the injunction which was a judicial order of the Court, made in the suit brought by the defendant against the plaintiff and others, and inasmuch as it has been held that there was no *mala fides* on the part of the defendant, and as there is no finding that there was an absence of reasonable and probable cause for the institution of the defendant's suit, the defendant should not be held liable for the plaintiff's claim for damages in respect of such detention, even though the injunction was subsequently discharged.

Further, it appears to us that the injunction was the judicial act of the Court, and there being no suggestion that the defendant failed to bring the facts fully to the notice of the Court, he was not liable for damages for the abovementioned detention. But this conclusion seems to be inconsistent with the decision in *Bhut Nath* v. *C. B. Pal Chowdhury* (1), and we, therefore, refer to the Full Court the question whether the plaintiff's suit for damages in respect of the detention of the chattels, in pursuance of the injunction granted by the Court in the suit brought by the defendant against the plaintiff and others, during the period from the 3rd April, 1911, until the 31st May, 1912, ($\frac{\text{and}}{\text{or}}$ the 18th June, 1912), is maintainable.

If it is held that the suit is maintainable in respect of the detention of the goods by reason of the injunction for the period, April 3rd, 1911, to 31st May, $\frac{\text{and}}{\text{or}}$ June 18th, 1912, on the ground of trespass, the question will arise whether the suit is barred by the Limitation Act, and whether article 29, 36 or 42 will apply.

Babus Jogis Chunder Roy and *Manmatha Nath Ray* for the Appellant.

Babus Baranashibasi Mookerjee and *Jitendra Lal Banerjee* for the Respondent.

The judgment of the Court was delivered by

April, 26.

Mookerjee, A. C. J.:—We are of opinion that this Reference was not necessary. There are two sets of decisions in the reports: In one set it is laid down that a person, who unlawfully interferes with the exercise of the property rights of another, commits an act in the nature of trespass to property, and is liable for damages in an action for trespass. In the other series of cases it is laid down

(1) (1912) 16 C. L. J. 34.

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that no suit lies for damages against a defendant for maliciously and without reasonable and probable cause, instituting a civil action. As an illustration of the former class, reference may be made to the case of *Bhut Nath Pal Mistry* v. *Chandra Binode Pal Cowdhury and others* (1). As an illustration of the latter class, reference may be made to the cases of *Bishun Singh* v. *A. W. N. Wyatt* (2) and *Mohini Mohan Misser* v. *Surendra Narayan Singh* (3). There is no conflict in principle between the two classes of cases, and the question in controversy really is, which set of decisions governs the present case on its special facts. That is not a matter for decision by a Full Bench.

The result is that we remit the case to the Division Bench to be considered and disposed of on its own circumstances with reference to the two sets of decisions to which reference has been made.

A. T. M. *Remitted to Division Bench.*

(1) (1912) 16 C. L. J. 34. (2) (1911) 14 C. L. J. 515.
(3) (1914) I. L. R. 42 Calc. 550; 21 C. L. J. 68.

APPELLATE CIVIL.

Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, and Sir Ernest Edward Fletcher, Knight, Judge.

KASI NATH BHATTACHARJEE AND OTHERS

v.

MURARI CHANDRA PAL.*

CIVIL.
1920.
April, 29, 30.

Presumption—Lost grant—Question of fact.

The gist of the principle upon which a lost grant is presumed, is that the state of affairs is otherwise unexplained: *Attorney General* v. *Simpson* (1) referred to.

When from a certain set of facts, a Court infers a lost grant, the process is one of inference of fact and not of legal conclusion.

Appeal by the Plaintiffs.

* Letters Patent Appeal No. 153 of 1919, against the decision of Mr. Justice Newbould, dated the 3rd July, 1919, in Appeal from Appellate Decree No. 1062 of 1918, against the decree of Babu Apara Prosad Mukherjee, Subordinate Judge, 2nd Court of Sylhet, dated the 14th February, 1918, reversing that of Babu Hem Chandra Sanyal, Munsiff, 2nd Court at Habiganj, dated the 14th June, 1917.

(1) (1901) L. R. 2 Ch. D. 671 (698).

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1920.

Kashi v. Murari.

1919. July, 3.

Suit for declaration of a right of way over a certain land.

The plaintiffs obtained a partial decree declaring their right in another matter, in the primary Court. This decree was reversed on appeal and the plaintiffs were given a declaration of the right of way claimed by them. This decision was, on second appeal, reversed by the following judgment of

Newbould, J.—This appeal arises out of a suit for declaration of the plaintiffs' right of way over the land described in the plaint. The plaintiffs based their claim on user for over 100 years and also as an easement of necessity. The suit was heard by the Munsiff and Court at Habigunge, and so far as their claim to right of way was concerned the suit was dismissed. The plaintiffs obtained a partial decree declaring their right in another matter which is not now in dispute. On appeal the Subordinate Judge of Sylhet reversed the finding of the Munsiff and held that the plaintiffs had established the right of way claimed by them. Both Courts found that the plaintiffs had not used the pathway for 10 or 12 years before suit and that consequently the plaintiffs could have no right of easement under section 26 of the Limitation Act. The Munsiff following the decision of this Court in case of *Achul Makta* v. *Rajun Makta* (1), framed the issues that were held to arise in a suit to establish an easement when limitation is pleaded, and he decided not only that the easement had not been enjoyed in the terms of section 26 of the Limitation Act within two years of the institution of the suit, but also that there was no evidence of enjoyment on the part of the plaintiffs of such character and duration as to justify the presumption of grant or other legal origin. The Subordinate Judge however has held that the circumstances of the case justify the presumption of a grant.

It is contended on behalf of the respondent that the finding that grant must be presumed is a finding of fact which cannot be attacked in second appeal. The facts found on which the presumption is based cannot be questioned, but the presumption is one of law. The presumption of lost grant is described in the Text Books as a legal fiction; see for example Peacock on Easement 2nd Edition at p. 411. The finding of a legal fiction can not be regarded as a finding of fact. Apart from other questions urged in this appeal it appears to me that this appeal must succeed on the point that the findings of the learned Subordinate Judge cannot support the presumption of lost grant. As stated before it is found that the pathway was not used for 10 or 12 years and it is also found that the plaintiffs have

(1) (1881) I. L. R. 6 Calc, 812.

another good pathway for their use. What is found in plaintiffs' favour is that in 1837 there was a suit between the predecessors of the present parties about certain land to the west of the site of the pathway now in dispute, and in that suit the present disputed pathway was described as a *gopath*. But the description of a piece of land as a *gopath* does not necessarily show that that land was a path over which any one except their having a right in the soil had a right of way. This appears to me to be an error running through the whole judgment and misleading the learned Subordinate Judge. He finds that there is a way which had been in existence for over 60 years; and then he goes on to say, "this pathway must have its origin in a grant else these defendants could not possibly have any pathway to go to the south and even to go out of their respective houses." A pathway is not the same as a right of way and a pathway can exist for more than 60 years without there necessarily being any right over it diminishing the right of the owners of the soil. Because the defendants used the pathway it can give no right of user to any one else. All that is found as regards user by others is that at times the plaintiffs and their men used this path.

I cannot accept the next conclusion that the learned Subordinate Judge comes to:—"It is clear that the origin of this pathway may well be held to be some ancient grant." The learned Subordinate Judge then goes on to meet the objection which was raised before him that even if the pathway be held to have origin in a grant that grant cannot have been in favour of the plaintiffs. This he answers by saying "If its origin be grant the grant must be for the villagers and not for any particular person or persons, and so the grant must have been made in favour of the plaintiffs as well." When the plaintiffs based their suit on the allegation of private right of way and not on the allegation that it was a public path or even a village path, the finding of grant to the public or to the villagers as a body could not justify the decree granted declaring the right of way in the plaintiffs.

On the facts found I would hold that there can be no legal presumption of the existence of any right of way in favour of the plaintiffs. I accordingly decree this appeal. The judgment and decree of the lower appellate Court are set aside and those of the Munsiff restored with costs. The appellant will get his costs in this and the lower appellate Court.

Against this decision, the plaintiffs appealed under clause 15 of the Letters Patent.

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Babus Dwarka Nath Chucherbutty and *Tarakeswar Nath Mitra* (*for Babu Nitish Chandra Lahiri*) for the Appellants.

Mr J. Mitra (Counsel) and *Babu Susil Kumar Bose* for the Respondents.

The judgment of the Court was delivered by

Mookerjee, A. C. J.:—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Newbould in a suit for declaration of a right of way over the land described in the plaint.

The plaintiffs based their claim on *user* for over one-hundred years and also asserted that the way was an easement of necessity. They obtained a partial decree in the Court of first instance. On appeal, the Subordinate Judge gave them a large measure of relief, on the ground that they had established the right of way claimed on the presumption of a lost grant. Upon second appeal to this Court, Mr. Justice Newbould has, on the facts found by the Subordinate Judge, come to the conclusion that the theory of a lost grant was not applicable. On the present appeal, it has been contended that the case was concluded by the finding of the Subordinate Judge and that it was not competent to Mr. Justice Newbould to reverse that finding on second appeal.

The Subordinate Judge found that the plaintiffs and their predecessors had exercised a right of way for over sixty years, though there had been an interruption of that right for 10 or 12 years, and he concluded that there must have been a lost grant.

Mr. Mitter on behalf of the defendants, respondents, has argued that the inference was one of law and that it was consequently open to this Court on second appeal to take a different view from that adopted by the Court of appeal below. We are unable to accept this contention as well-founded. The gist of the principle upon which a lost grant is presumed is that the state of affairs is otherwise unexplained. Mr. Justice Farwell observed, in the case of *Attorney General* v. *Simpson* (1), that "When the Court finds an open and uninterrupted enjoyment of property for a long period unexplained, *omnia presumuntur rite esse acta*, and the Court will, if reasonably possible, find a lawful origin for the right in question." That the process is one of inference of fact and not of legal conclusion is well-established. We need refer only to the observations of Brett, L. J., in *Angus* v. *Dalton* (2), where he stated that the question in controversy was, whether the inference was to be treated as a necessary

(1) (1901) L. R. 2 Ch. D. 671 (698). (2) (1878-81) L. R. 4 Q. B. D. 201.

legal consequence or as an inference of a fact. This was said with regard to what had happened in the decisions cited during argument of that case, which fell into two classes. In one class of cases it was stated that if *user* for twenty years was established, the jury could be directed as a matter of law to hold that a lost grant had been made out. In the other class of cases, it had been held that the jury were free to draw an inference to that effect, if the evidence was not rebutted. Brett, L. J., added that if the case was tried before a Judge without a jury, he must find such fact, though he might not do so in terms; if it was tried before a Judge and jury, inasmuch as the Judge could not in such case determine any fact, it was the jury which must find the fact. This view is supported by the judgment of Baron Parke in *Bright* v. *Walker* (1), and that of Baron Alderson in *Jenkins* v. *Harvey* (2). Such a grant may be presumed from acts of ownership or of enjoyment for twenty years and upwards consistent with the grant alleged in the plea: *Campbell* v. *Wilson* (3). *Livett* v. *Wilson* (4); *Bass* v. *Gregory* (5), Pothier on Obligation, note by Evans, Vol. II, page 136; Bullen and Leake's Precedents of Pleading, third edition, page 812; where reference is made to *Pomfret* v. *Ricroft* (6), and *Yard* v. *Ford* (7).

The view we take is in harmony with the decision of the Judicial Committee in the case of *Rajrup Koer* v. *Abul Hossain and others* (8), which is an authority for the proposition that the Limitation Act was not exhaustive and that a man might acquire a title under it who had no other right at all, but it did not exclude or interfere with other titles and modes of acquiring easements. The Judicial Committee then proceeded to observe as follows: "Their Lordships think that, in this case, there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time. The result of the facts which appear in evidence, and the effect of the judgments of the Munsiff and of the Subordinate Judge, are thus stated in the judgment of the High Court: "The evidence shows, and the Courts appear to have found, that the *pain* was constructed by the ancestors of the plaintiff a great many years ago, possibly fifty or sixty years—certainly more than twenty years—for the purpose of irrigation; and there is part of

(1) (1834) 1 Cr. M. & R. 211; 40 R. R. 536.
(2) (1835) Cr. M. & R. 877 (895); 40 R. R. 769.
(3) (1803) 3 East. 294.
(4) (1825) 3 Bingham 115; 10 Moore. 439.
(5) (1890) 25 Q. B. D, 481. (6) (1682) 2 Wms. Saund. 175 (a).
(7) (1681) 1 Wms. Saund. 323 (b).
(8) (1880) I. L. R. 6 Calc. 394; L. R. 7 I. A. 240; 7 C. L. R. 529

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the evidence which indicates that such construction was accompanied with certain advantages on the part of the defendants, which compensated them for any injury or inconvenience caused by the construction of the *pain*. This being an artificial *pain* constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since, or at least down to the time of the obstruction complained of by the plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought to, refer such a long enjoyment to a legal origin, and, under circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff's mehal and the defendant's land by which the right was created. That being so, the plaintiff does not require the aid of the statute ; and his right, therefore, is not in any degree interfered with by the provsion in the 27th section, upon which the Munsiff decided." This judgment makes it clear that in the opinion of the Judicial Committee it was open to a Court of fact, upon the circumstances of the case and the long user proved, to draw the inference that the user had a legal origin, in other words, that a lost grant had been established.

Reliance has been placed by the respondent upon the decision of Sir Barnes Peacock, C. J., in *John George Bagram* v. *Khettranath Karformak* (1), as also upon the decision in *Charu Surnokar* v. *Dokouri Chunder Thakoor* (2). Neither of these cases, in our opinion, is of any assistance to the respondents, as they do not show that the inference is an inference of law. As we have already explained, there was at one time some controversy over the question whether, if twenty years' *user* was esbablished, the Court was or was not bound as a matter of law to infer a lost grant. If the view be accepted, that such an inference must be drawn as a matter of law the respondent is out of Court. If, on the other hand, the view be adopted that the question is for decision by the Court of fact he is equally out of Court, because the Subordinate Judge has here found that legal origin had been establisbed. In our opinion, it was not competent to this Court in second appeal to interfere with the judgment of the Subordinate Judge.

The result is that this appeal is allowed, the decree made by Mr. Justice Newbould set aside and that of the Subordinate Judge restored with costs both here and before Mr. Justice Newbould.

A. T. M. *Letters Patent appeal allowed.*

(1) (1869) 3 B. L. R. (Orig. Side) 18 (48).

(2) (1882) I. L. R. 8 Calc. 956).

Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, and Sir Ernest Edward Fletcher, Knight, Judge.

INDUBALA DEBI

v.

ATUL CHANDRA GHOSH.*

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1920.

April, 29.

Res judicata—*Civil Procedure Code (Act V of 1908), Sec. 11—Directly and substantially in issue—Suit for ejectment, previous—Pleadings, issues and judgment—Status, question of.*

The question of *res-judicata* is to be decided with reference to the pleadings, the issues and the judgment : *cases on the point* referred to.

In the previous litigation, the plaintiff sued to eject the defendant on the allegation that he himself was a raiyat and the defendant herself was an under-raiyat. The claim for ejectment failed, because the Court found it established that the defendant had a "protected interest" within the meaning of section 160 of the Bengal Tenancy Act :

Held, that the decision of the question of *status* involved in the subsequent suit to restrain the defendant from cutting trees on her holding was not barred by *res judicata*, as it was not directly and substantially in issue in the previous suit.

Appeal by the Defendant.

Suit for injunction to restrain the defendant from cutting trees on her holding.

The suit was decreed by the primary Court. This decision was reversed on appeal. On second appeal by the plaintiff, the decision of the primary Court was upheld by the following judgment of

Newbould, J. :—This is an appeal against a decision of the Subordinate Judge of Nadia reversing a decision of the Munsiff of Krishnagar. The Munsiff gave the plaintiff a decree permanently restraining the defendant from cutting down and appropriating trees on the land which is subject of the suit with this modification that the injunction should not prevent her from cutting down trees. Where the act was necessary for the improvement or preservation of the garden and that in such cases too she should not appropriate the trees. He further gave the plaintiff a decree for recovery of Rs. 40 as compensation for five trees cut down and appropriated by the defendant. This decree was reversed on appeal by the Subordinate Judge on the ground that the plaintiff had not succeeded in proving his right to the timber since he had not proved the

1919.

June, 20.

* Letters Patent Appeal No. 132 of 1919, against the decision of Mr. Justice Newbould, dated the 20th June, 1919, in Appeal from Appellate Decree No. 1204 of 1918, against the decree of Babu Ananda Kishore Dutt Roy, Subordinate Judge of Nadia, dated the 13th March, 1918, reversing that of Babu Srish Chandra Chowdhury, Munsiff, 1st Court at Krishnaghar, dated the 27th July, 1916.

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Indubala v. Atul.

Newbould, J.

status of himself or of the defendant. The question as to the status of the plaintiff and the defendant was fought out in a previous suit. In that suit the plaintiff claimed the right to eject the defendant on the ground that he was a raiyat and she was an under-raiyat. It was found in that suit that the plaintiff was a tenure-holder and the defendant a raiyat and that her interest was a protected interest. After reading the judgments both of the first Court and of the appellate Court in the previous suit I have been unable to accept the view of the learned Subordinate Judge that that finding does not operate as *res judicata* in the present suit as to the status of the parties. Further it will appear that the defendant in the present suit as also in the previous suit never set up a higher status than that of a raiyat nor did she attempt to contest the present suit on the contention that she had the lower status of an under-raiyat. After the previous decision between the parties the defendant cannot dispute that the plaintiff has the right of a tenure-holder and that on that right he was entitled to the decree which he obtained in the Court of the Munsiff.

I accordingly, decree this appeal and reverse the decree of the lower appellate Court and restore that of the Munsiff.

The appellant will get his costs in this and in the lower appellate Court.

Against this decision, the defendant appealed under clause 15 of the Letters Patent.

Babu Kristo Lal Banerjee (for *Babu Baranashikasi Mukerjee)* for the Appellant.

Babu Amarendra Nath Bose for the Respondent.

The judgment of the Court was delivered by

April, 29.

Mookerjee, A. C. J.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Newbould in a suit for an injunction to restrain the defendant from cutting trees on her holding.

The determination of the controversy between the parties depends upon the ascertainment of the precise *status* of the plaintiff and the defendant. It appears that for the purpose of the decision of this question, reliance was placed upon the result of a previous litigation between the parties as conclusive of the matter in dispute. The primary Court held that the previous decision operated as *res judicata* ; the Subordinate Judge adopted a contrary view which has not met with the approval of Mr. Justice Newbould. We are now invited to decide which of these conflicting opinions is correct in law.

In the previous litigation, the plaintiff endeavoured to eject the defendant on the allegation that he himself was a raiyat and the defendant herself was an under-raiyat. The claim for ejectment failed, because the Court found it established that the defendant had a "protected interest" within the meaning of section 160 of the Bengal Tenancy Act. That conclusion was no doubt sufficient for the determination of the question then in issue, but really it cannot conclude the decision of the question of *status* involved in the present litigation. Indeed, in the previous suit, the claim of the plaintiff could be successfully defeated merely on proof that the defendant had some higher *status* than that of an under-raiyat, and it would be immaterial to determine the precise *status* of the defendant, namely, whether he was a tenure-holder, a raiyat at fixed rates, an occupancy raiyat or a non-occupancy raiyat, consequently, we cannot hold that the question now directly and substantially in issue was directly and substantially in issue in the previous suit.

We find that the Courts below decided the question of *res judicata* merely with reference to the judgment in the previous suit. This was manifestly erroneous, for as has been repeatedly pointed out, the question of *res judicata* must be decided with reference to the pleadings, the issues and the judgment. Reference may, in this connection be made to the decision of the judicial committee in *Kalikrishna* v. *Secretary of State* (1); *Jagatjit* v. *Sarabjit* (2); *Kurratulain* v. *Nawab Peara* (3); and of this Court in *Surjiram* v. *Barhamdeo* (4); *Gurdeo* v. *Chandrikah* (5); *Ranjit* v. *Basanta* (6) which accord with the rule recognized in *Robinson* v. *Dulcep* (7); *In re May* (8); *Houstoun* v. *Sligo* (9).

The result is that the appeal is allowed, the decree of Mr. Justice Newbould set aside and the case remitted to the Court of first instance so that it may be retried on such evidence as may be adduced by both parties.

Costs will abide the result.

Fletcher, J.—I agree.

A. T. M. *L. P. appeal allowed.*

(1) (1888) L. R. 15 I. A. 193; I. L. R. 16 Calc. 173.
(2) (1891) L. R. 18 I. A. 176; I. L. R. 19 Calc. 159.
(3) (1905) L. R. 32 I. A. 244; I. L. R. 33 Calc. 116; 1 C. L. J. 594.
(4) (1905) 1 C. L. J. 337 (349).
(5) (1907) 5 C. L. J. 611 (624); I. L. R. 36 Calc. 193.
(6) (1908) 9 C. L. J. 597 (603).
(7) (1879) 11 Ch. D. 798.
(8) (1883) 25 Ch. D. 236.
(9) (1885) 29 Ch. D. 448.

SPECIAL BENCH.

Before Sir Asutosh Mookerjee, Knight, Acting Chief Justice, Sir Ernest Edward Fletcher, Knight, Judge, Sir Nalini Ranjan Chatterjea, Knight, Judge, Mr. Justice Teunon, Mr. Justice Richardson, Sir Asutosh Chaudhuri, Knight, Judge, and Nawab Sir Syed Shamsul Huda, Knight, Judge.

CIVIL.

1920.

May, 4, 5, 6, 7. June, 1.

CHANDRA BENODE KUNDU

v.

SHAIKH ALA BUX AND OTHERS.*

Decree; execution of—Landlord holding money decree against occupancy raiyat —Landlord, if can sell the holding in execution—Authority of long established decided cases—Occupancy raiyat, interest of—Bengal Tenancy Act (VIII of 1885), if exhaustive.

The sole landlord of a raiyat is competent to sell in execution of a money decree against the raiyat, his occupancy holding, whether the holding be or be not transferable by custom or local usage.

Bikram Ali v. *Gopi Kanth* (1) over-ruled.

The transfer of the whole or part of an occupancy holding is operative as against the raiyat, whether it is made voluntarily or involuntarily.

Dayamayi v. *Ananda Mohan* (2) partially modified.

The doctrine that the authority of long established decided cases is to be maintained, is not of universal application. It has no application where the decision does not embarrass trade or commerce, nor affects transactions which may have been adjusted, rights which may have been determined, titles which may have been obtained or personal status which may have been acquired: *Balusu* v. *Balusu* (3) referred to.

Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and specially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, it is the duty

* Full Bench Reference in Appeal from Order No. 242 of 1918, against the decision of S. E. Stinton, Esq., District Judge of Dacca, dated the 4th May, 1918, affirming that of Babu Mahendra Nath Mukhoti, Munsiff of Munshiganj, dated the 2nd February, 1918.

(1) (1897) I. L. R. 24 Calc. 355.

(2) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.

(3) (1898-99) I. L. R. 22 Mad. 398 (430); L. R. 26 I. A. 115.

of the Court of ultimate appeal to over-rule them, if it has not lost the right to do so by itself expressly affirming them : *Westham Union* v. *Edmonton Union* (1).

Whatever might have been the earlier law, the occupancy raiyat enjoys under the Bengal Tenancy Act substantial rights in the land and his interest cannot be appropriately described as a merely "personal right" or "personal privilege."

The Bengal Tenancy Act is not a complete Code : *Kripa Sindhu* v. *Annada* (2). It nowhere purports to give an exhaustive enumeration of all the incidents of occupancy right.

Appeal by a decree-holder.

The decree-holders landlords, obtained a money decree against their tenants Shaikh Ala Bux, and in execution of that decree attached his occupancy holding. The judgment-debtor objected that as the holding was not transferable by custom or usage, it could not be sold in execution of a decree for money, even though the decree-holder be the sole landlord of the raiyat. The Courts below gave effect to this objection and dismissed the application for execution. Against this decision, the decree-holder appealed. The appeal came on for hearing before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Panton on the 21st August, 1919, who made the following order of reference to the Full Bench. As the decision involved consideration of another Full Bench case, a Special Bench was constituted to hear the Reference.

Order of Reference.

1919.
August, 21.

This is an appeal by a decree-holder against an order made by the Court of appeal below in affirmance of an order of the Court of first instance dismissing an application for execution of a decree. The applicants hold a decree for money against the respondent, and in execution of that decree have attached his holding. It so happens that the applicants are the landlords of the respondent. The respondent is a *raiyat* with right of occupancy. His objection is that the holding is not transferable by custom or usage, and cannot be sold in execution of the decree held by the applicants. The Courts below have given effect to this objection and have held that a non-transferable occupancy holding cannot be sold in execution of a decree for money, even though the decree-holder be the sole landlord of the *raiyat*. There is no authority in this Court directly in point, but reliance has been placed by the appellant and the respondent upon decisions, in support of their respective contentions, which cannot be reconciled. The point was raised in *MacPherson* v. *Debibhusan* (3) where it was ruled that a sixteen annas landlord can-

(1) (1908) App. Cas. 1 (4).
(2) (1907) I. L. R. 35 Calc. 34 ; 6 C. L. J. 273.
(3) (1917) 2 Pat. L. J. 530.

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not sell his *raiyat's* occupancy holding in execution of a money decree, unless the *raiyat's* occupancy-holding is transferable by usage. It was pointed out that the rule propounded in *Ananda Das* v. *Rutnakar* (1); *Shakaruddin* v. *Hemangini* (2), and *Dwarkanath* v. *Tarini Sankar* (3), cannot be reconciled with the decision in *Agarjan Bibi* v. *Panaulla* (4). The decision of the Full Bench in *Dayamayi* v. *Ananda Mohan* (5), does not directly touch the question; and the appellants have contended that the operation of the propositions enunciated by the Full Bench should not be extended on logical grounds to cases, in which the circumstances are fundamentally different from those of the litigations which led to the Full Bench reference. Dr. Dwarka Nath Mitra has further argued that the Full Bench could not have intended to legislate in this matter, and that expressions of opinion which went beyond the reference and were not required for the decision of the question actually before the Court, however valuable, cannot be regarded as binding. The respondent has referred to the decision in *Narayani* v. *Nabin Chandra* (6), and later decisions where that case has been followed. The respondent has conceded that these cases do not directly help his contentions; but he has argued that the principle enunciated therein, as a logical extension of the rules formulated by the Full Bench should be logically extended a step further. In this state of conflict of judicial opinion, we must refer the question which requires decision in the case before us, to a Full Bench. That question may be formulated in the following terms: Is the sole landlord of a *raiyat* competent to sell, in execution of a money decree against the *raiyat*, his occupancy holding, unless the holding is transferable by usage or custom? Under the rules of the Court, the whole appeal is referred to the Full Bench.

Dr. Dwarka Nath Mitter (with him *Babus Manindra Nath Banerjee, Biraswar Bagchi* and *Narayan Chandra Kar*) for the Appellant:

The appeal, out of which this reference arises, is on behalf of some of the decree-holders. The entire body of landlords obtained a decree for money against their occupancy raiyat and in execution of that decree they sought to put up the holding to sale. The tenant objected to the sale. The lower Courts relying upon the

(1) (1903) 7 C. W. N. 572.
(2) (1911) 16 C. W. N. 420.
(3) (1907) I. L. R. 34 Calc. 199; 5 C. L. J. 294.
(4) (1910) I. L. R. 37 Calc. 687; 12 C. L. J. 169.
(5) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.
(6) (1916) 25 C. L. J. 351; 21 C. W. N 400.

decision in *Narayani* v. *Nabin Chandra* (1), upheld the tenant's objection. Hence this appeal by some of the decree-holders.

Firstly, the point is not covered by the decision in *Dayamoyi's case* (2). In none of the three cases viz., *Ananda* v. *Rutnakar* (3); *Shakaruddin* v. *Hemangini* (4), and *Dwarkanath* v. *Tarini* (5), did the precise point arise for consideration.

Refers to *Dayamoyi's case* (2) to show that the present point is not covered by that decision. Reads p. 181 of the report.

[C. J.—All the three questions did not arise in the appeal].

No. Reads top of p. 179. Reasons are given at p. 224.

The questions were not viewed at from the point viz. what would be the effect of landlord's consent; it was rather assumed that it would validate the transfer.

[C. J.—Look at S. 65 of the Bengal Tenancy Act. Is a co-sharer landlord competent, in execution of a decree for his share of the rent, to sell the holding?]

[N. R. Chatterjea, J.—There are three cases holding that he is not].

The answer depends upon the solution of the question now before their Lordships, viz. whether the tenant has a right to object.

Refers to S. 183, Bengal Tenancy Act, illustration (1).

[N. R. Chatterjea, J.—What does this show?]

S. 183 seems to suggest that where the word non-transferable is used, it means not that it is inalienable but only that it is not transferable except with the consent of the landlord.

Secondly, enunciations of general principle of law, in *Dayamoyi's case* (2), do cover the present case but as they were not necessary for the decision in those cases, they are *obiter*, having no binding effect. Reads the observations of Sir George Jessel in *Quilter* v. *Heatly* (6) "Speaking for myself, I do not pay much attention to the dicta of modern Judges, as I consider it my duty to decide for myself. This, of course, does not apply to decisions of modern Judges nor to old recognised dicta of eminent Judges."

Thirdly, if those general enunciations are, however, treated as parts of the very essence of the decisions, then they are not correct.

Now, the first proposition submitted for consideration is, that voluntary alienation and involuntary alienation stand on the same

(1) (1916) 25 C. L. J. 351; 21 C. W. N. 400.
(2) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.
(3) (1903) 7 C. W. N. 572. (4) (1911) 16 C. W. N. 420.
(5) (1907) I. L. R. 34 Calc. 199; 5 C. L. J. 294.
(6) (1883) 23 Ch. D. 42 (49).

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footing ; one is a measure of the other ; the two are co-extensive ; both stand or fall together. On principle, the right to take property at execution sales, depends on the nature of the property and not on the consent of the judgment-debtor : what can be voluntarily sold, may be seized. Refers, in this connection, to *Wood* v. *Wood* (1) ; Reads S. 60 cl. (1) of the Code of Civil Procedure.

Both on principle and on authority, no distinction can be made between voluntary alienation and involuntary alienation : See the observations of Louis Jackson and McDonell JJ. in *Dwarka Nath* v. *Hurrish* (2) : Ghose and Pratt JJ. in *Ananda* v. *Rutnakar* (3) ; Sir Lawrence Jenkins C. J. and Doss J. in *Agarjan* v. *Panaulla* (4) Richardson and Mullick JJ. in *Purna* v. *Chandra* (5) in the order of reference.

With regard to voluntary alienation, raiyat's power of transfer

(*a*) even without the consent of the landlord, appears to be well-established : (Mookerjee and Walmsley, JJ.) in *Beharilal* v. *Sindkubala* (6) ; (N. R. Chatterjea and Richardson, JJ.) in *Mahesh* v. *Maharaja Bahadur* (7) ; *Dayamoyi* v. *Ananda* (8) ;

(*b*) with the consent of the landlord, has never been questioned. With the consent of the landlord, the raiyat can pass a perfect title. Without such consent, he can give the purchaser a title which is good as against every one, except the landlord.

Reads from Sir John Shore's Minute ; Fifth Report. Vol. II, p. 389 ; Harrington's Analysis Vol. III, pp. 434, 469.

Reads p. 434—"It is however generally understood, that the raiyats by long occupancy acquire a right of possession in the soil, and are not subject to be removed ; but this right does not authorize them to sell or mortgage it ; and it is so far distinct from a right of property. This, like all other rights, under a despotic, or varying, form of Government, is precarious. The zemindars, when an increase has been forced upon them, have exercised the right of demanding it from their raiyats. If we admit the property of the soil to be solely vested in the zemindars, we must exclude any acknowledgment of such right in favour of the raiyats, except where they may acquire it from the proprietor" to shew that even before

(1) (1843) 4 Q. B. 397.
(2) (1879) I. L. R. 4 Calc. 925 (928).
(3) (1903) 7 C. W. N. 572 (573).
(4) (1910) I. L. R. 37 Calc. 687 (693).
(5) (1916) 23 C. L. J. 304 (307).
(6) (1917) 22 C. W. N. 210.
(7) (1912) 17 C. W. N. 70.
(8) (1914) I. L. R. 42 Calc. 172 ; 20 C. L. J. 52.

the Permanent Settlement the interest of the raiyat was not absolutely inalienable ; it was non-transferable except with the consent of the landlord ; with such consent it was transferable.

To show that the raiyat's power to transfer, with the consent of the landlord, was never questioned, refers to *Prosonokumar Tagore* v. *Rammohun Doss* (1); *Taramonee Dassee* v. *Birressur Mozoomdar* (2); *Ramchunder Mitter* v. *Ramsanee Bebee* (3) ; *Sreeram Bose* v. *Bissonath Ghose* (4) ; *Hero Chunder Goho* v. *A. D. Dunn* (5) ; *Ajoodhya Pershad* v. *Mussamut Imam Bandi Begum* (6) ; *R. Watson & Co.* v. *Ranee Shurut Soondaree Debia* (7); *Tara Pershad Roy* v. *Soorjo Kant Acharjee* (8) ; *Hyder Buksh* v. *Bhubendro Deb Koonwar* (9) : *Forester* v. *The Secretary of State for India* (10) ; *Bibee Sukodra* v. *Mr. Maxwell Smith* (11) ; *Bootee Singh* v. *Moorut Singh* (12) ; *Nurendro Nerain Roy* v. *Ishan Chunder Sen* (13) ; *Palakdhari* v. *Manners* (14) ; *Ananda* v. *Ratnakar* (15) ; *Jagun* v. *Posun* (16) ; *Sibo Sundari* v. *Raj Mohun* (17) ; *Hari Das* v. *Udoy* (18) ; *Udoy* v. *Hari Das* (19) ; *Mahesh* v. *Maharaja Bahadur* (20) ; *Daya Moyi* v. *Anando* (21) ; *Beharilal* v. *Sindhubala* (22).

The cases of *Tara Pershad* v. *Soorjo Kant* (8), and *Hyder* v. *Bhubendro* (9), which have been relied upon by Sir Lawrence Jenkins, C. J. in *Agarjan* v. *Panaulla* (23), as shewing that the consent of the landlord, would not validate the transfer, are, it is submitted, no authorities for that proposition. The point in those cases was, whether, the possession of the raiyat, who had not acquired a right of occupancy, and the possession of a purchaser (who purchased with the landlord's consent), each of them being short of the statutory period of twelve years, could be tacked in order to give the purchaser a right of occupancy. It was held, that under the law, it could not be done. The point viz. what the effect of the land-

(1) (1855) Beng S. D. A. R. 14. (2) (1864) 1 W. R. 86.
(3) (1865) 2 W. R. Act X, Rul. 4. (4) (1865) 3 W. R. Act X Rul. 2.
(5) (1866) 5 W. R. Act X Rul. 55.
(6) (1867) 7 W. R. 528 F. B ; B. L. R. Sup. Vol. 725.
(7) (1867) 7 W. R. 395. (8) (1871) 15 W. R. 152.
(9) (1872) 17 W. R. 179. (10) (1872) 18 W. R. 349 (353) P. C.
(11) (1873) 20 W. R. 139. (12) (1873) 20 W. R. 478.
(13) (1874) 22 W. R. 22 (F. B) ; 13 B. L. R. 274.
(14) (1895) I. L. R. 23 Calc. 179.
(15) (1903) 7 C. W. N. 572. (16) (1903) 8 C. W. N. 172.
(17) (1903) 8 C. W. N. 214. (18) (1908) 8 C. L. J. 261.
(19) (1909) 10 C. L. J. 608. (20) (1912) 17 C. W. N. 70.
(21) (1914) I. L. R. 42 Calc 172. (22) (1917) 22 C. W. N. 210.
(23) (1910) I. L. R. 37 Calc. 687 ; 12 C. L. J. 169.

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lord's consent would be, if the raiyat had completed his twelve years and thus had acquired a right of occupancy, did not arise in that case and so was not considered.

The observations, moreover, in the latter case, *Hyder* v *Bhubindro* (1) at p. 180.—"It is true that the zemindar consented to the transfer, but such consent cannot give to the defendants any right higher than that possessed by their vendor; and as it appears from the facts of this case that the vendor was a mere tenant-at-will, and as under the provisions of the section referred to, the defendants are not entitled to add to their own possession the possession of their vendor, this ground of appeal must fail"—are in my favour. The proposition that with the consent of the landlord, the raiyat could give what he himself had, was not doubted by their Lordships; it was rather accepted. The decision in that case went against the appellant, only because the vendor had no right of occupancy; he was merely a tenant-at-will.

The decision of the Judicial Committee in *Chandrabati* v. *Harrington* (2), which was relied upon by Sir Lawrence Jenkins, C. J. in *Agarjan* v. *Panaulla* (3) in support of his conclusion that right of occupancy is a mere personal right and that it is not transferable, does not, it is submitted, lend any support to that view. The point which the Judicial Committee had to consider was, whether the purchaser could tack the raiyat's possession to his. There was no question of consent in that case and the suit was brought by the landlord against the purchaser. The question whether landlord's consent would not validate the sale, did not arise in that case. The Judicial Committee did not intend to say that the right was absolutely inalienable.

[C. J.—That is so. If the Judicial Committee had said so, the Full Bench reference in *Dayamoyi* (4), would have been unnecessary].

The Full Bench decision in *Nurendra* v. *Ishan* (5) also, is no authority for the proposition that occupancy right is not alienable at all. There the suit was instituted by the landlord to eject the purchaser. The effect of landlord's consent was not therefore considered. The order of reference in that case and also that in *Ajoodhya* v. *Imam Bandi* (6) seem to show that landlord's consent would validate the transfer.

(1) (1872) 17 W. R. 179.
(2) (1890) I. L. R. 18 Calc. 349; L. R. 18 I. A. 27.
(3) (1912) I. L. R. 37 Calc. 687; 12 C. L. J. 169.
(4) (1914) I L. R. 42 Calc. 172; 20 C. L. J. 52.
(5) (1874) 22 W. R. 22; 13 B. L. R. 274.
(6) (1867) 7 W. R. 528; B. L. R. Sup. Vol. 725.

There are observations both in *Nurendro* v. *Ishan* (1), and *Bibee Sukodra* v. *Mr. Maxwell Smith* (2), which seem to suggest that with the landlord's consent, the transfer would be valid. The expressions 'personal right', 'right is not transferable', should therefore, be taken as having been made with reference to the facts of those cases. It was not meant that the right was absolutely inalienable or *extra commercium*.

If the first two propositions viz. that voluntary alienation and involuntary alienation stand on the same footing and that in case of voluntary alienation, the raiyat can confer title,—if these two propositions are sound, then, it follows that in similar circumstances, the interest of the raiyat is liable to be sold in execution.

Involuntary sale.

Nextly, even assuming that the power of voluntary alienation is not the measure of the power of involuntary alienation, no case can be found in the books prior to the Full Bench in *Dayamoyi* (3), which has gone the length of holding that an occupancy right cannot be sold in execution of a decree for money, even with the consent of the landlord. The only case, prior to the Full Bench, which may be said to be somewhat against me is that of *Bhiram Ali* v. *Gopi Kanth* (4). But that case is distinguishable. There, after the sale, the landlord went on receiving rent from the old tenant and so was not competent, in law, to recognise the purchaser. Moreover, the recognition, if any, was long after the purchase. It was no consent to the sale. The observations in that case, therefore, were *obiter*. If that case, however, is taken as having decided the present question, it is submitted, it is incorrect.

Refers to *Bhiram Ali* v. *Gopi Kanth* (4); *Durga Charan* v. *Kali Prasanna* (5); *Sadagar* v. *Krishna* (6); *Majed Hossein* v. *Raghubur* (7); *Gahar* v. *Kasi Muddi* (8); *Sita Nath* v. *Atmaram* (9); *Ananda* v. *Rutnakar* (10): *Murullah* v. *Burullah* (11); *Dwarka nath* v. *Tarini* (12); *Samiruddin* v. *Benga* (13) and *Shakaruddin* v. *Hemangini* (14), cases on involuntary alienation, to show that in none of them was a sale consented to by the entire body of landlords, and the sale was considered invalid. The decision in *Ananda* v. *Rutnakar* (10) is directly in point. In *Shakaruddin* v. *Hemangini* (14),

(1) (1874) 22 W. R. 28; 13 B. L. R. 274. (2) (1873) 20 W. R. 139.
(3) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.
(4) (1897) I. L. R. 24 Calc. 353. (5) (1899) I. L. R. 26 Calc. 727.
(6) (1899) I. L. R. 26 Calc. 937. (7) (1899) I. L. R. 27 Calc. 187.
(8) (1899) I. L. R. 27 Calc. 415. (9) (1900) 4 C. W. N. 571.
(10) (1903) 7 C. W. N. 572. (11) (1905) 9 C. W. N. 972.
(12) (1907) I. L. R. 34 Calc. 199; 5 C. L. J. 294.
(13) (1909) 13 C. W. N. 630. (14) (1911) 16 C. W. N. 490.

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the sale was consented to by some of the landlords. Even then, it was held that the purchaser got a good title to the extent of that share. Some of the cases draw a distinction between consent by the entire body of landlords, and consent by some of them, in the sense, that in the case of consent by the entire body, the purchase is valid, and in the other case, not.

The cases after the Full Bench, *Badarennessa* v. *Alam Gasi* (1); *Narayani* v. *Nabin Chandra* (2), and *MacPherson* v. *Debibhusan* (3) are based on it. If the Full Bench is incorrect, it follows that those decisions also cannot stand.

Assuming that the case of *Bhiram Ali* (4) decided in 1897, is really against me, it appears that the life of that decision was very short; in only five years, current began to flow just the other way; it was laid down in *Ananda* v. *Ratnakar* (5) that an occupancy holding may be sold in execution, with the consent of the landlord; this decision continued to be followed till the decision of the Full Bench in *Dayamoyi* (6). The subsequent decisions only follow the Full Bench.

Estoppel:

As to the argument that cases of voluntary alienation are based on the doctrine of estoppel, it is submitted that if a transaction is absolutely void, the doctrine of estoppel has no application: *Samsuddin* v. *Abdul* (7) and *Rebati* v. *Ahmed* (8).

Again, if it is put on the ground of estoppel, only the tenant and persons claiming through him will be estopped and no one else. But it has been held that where the transfer is operative against the raiyat, it is operative against all other persons. Sir Lawrence Jenkins, C. J. in the course of the argument in *Dayamoyi's case* (6), said "Resting it on estoppel, your difficulty is this; not that the holding has been transferred but that a particular individual cannot say that it has not been transferred, which is something different."

Sir Lawrence Jenkins, C. J. also said in *Agarjan* v. *Panaulla* (9) ....."Though I refrain from expressing any opinion as to the doctrine of estoppel." As to estoppel, there is this further difficulty that there can be no estoppel, where the truth is known to both parties and in the cases on estoppel, no enquiry was ever made with regard to that.

(1) (1915) 21 C. L. J. 650; 19 C. W. N. 814.
(2) (1916) 25 C. L. J. 351; 21 C. W. N. 400; I. L. R. 44 Calc. 730.
(3) (1917) 2 Pat. L. J. 530.
(4) (1897) I. L. R. 24 Calc. 355.
(5) (1903) 7 C. W. N. 572.
(6) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.
(7) (1906) I. L. R. 31 Bom. 165.
(8) (1907) 9 C. L. J. 50.
(9) (1910) I. L. R. 37 Calc. 687; 12 C. L. J. 169.

It is submitted, therefore, that it is not correct to say that the cases of voluntary alienations can be put on the ground of estoppel. Next, refers to *Bibee Sukodra* v. *Mr. Maxwell Smith* (1) ; *Nursudro Ishan* (2) ; *Bhagirath* v. *Hafizuddin* (3) ; *Ayenuddin* v. *Srish* (4) ; *Hari Das* v. *Udoy* (5) ; *Hara Chandra* v. *Umesh* (6) ; *Amulya Ratan* v. *Tarini* (7) and *Umes* v. *Jaynath* (8) in which the question of estoppel was discussed.

Occupancy right, not a personal right.

Even assuming that an occupancy right was a purely personal right under the earlier Acts and before, it cannot be so treated under the present Tenancy Act, seeing that an occupancy raiyat has much higher right than under the earlier Acts. Under Act X of 1859, the occupancy raiyat was liable to ejectment for default of payment of rent ; under the present law, he is not. Under the old Act, the landlord, by a contract with the raiyat, could bar the acquisition of occupancy right. Under the present Act, the raiyat will acquire occupancy right, any contract to the contrary, notwithstanding. Refers to sections 19, 20, 21, 65, 73, 85, 136 cl. (5) of the Bengal Tenancy Act ; also to section 183 illustration (1) ; S. C. Mitra's Land Law of Bengal, p. 303. "The Act of 1859 recognised only a right to hold and cultivate, the Act of 1885 has recognised, in addition, a limited proprietary right in the raiyat."

Laws of other countries.

In other countries, where there is no statutory restriction against alienation except with the lessor's assent, such restriction has been held to enure for the benefit of the landlord : Tiffany on Landlord and Tenant, Vol. I pp. 939, 947.

Babu Biraj Mohan Mojumdar for some of the decree-holders Respondents, supported the Appellants.

Babu Rames Chandra Sen for the judgment-debtor Respondent :

Laws of other countries.

The relationship between landlord and tenant in this country is governed by custom. Principles of English land-tenure are not applicable to this country. Each country has got its own peculiar land system.

(1) (1873) 20 W. R. 139.
(2) (1874) 22 W. R. 22 ; 13 B. L. R. 274.
(3) (1900) 4 C. W. N. 679.
(4) (1906) 11 C. W. N. 76.
(5) (1908) 8 C. L. J. 261.
(6) (1909) 11 C. L. J. 20 ; 14 C. W. N. 71.
(7) (1914) I. L. R. 42 Calc. 254 ; 21 C. L. J. 187 ; 18 C. W. N. 1290.
(8) (1917) 22 C. W. N. 474.

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Customary right.

The right of occupancy is peculiar to this country and has got its own peculiar incidents. The occupancy raiyat of the present day, corresponds to the *Khudkhast* raiyat under the Regulations and before. The *Khadkhast* raiyat had certain customary rights, independent of the landlord.

[C. J.:—Where are these customs to be found?]

In the Government proceedings at the time of the Permanent Settlement and in standard authorities. Refers to Harrington's Analysis, Vol. III pp. 398-99, shewing raiyat's right to possess but not to alienate or change the nature of cultivation: Harrington's Analysis, Vol. III p. 460; Fifth Report, Appendix I, paragraphs 383, 389, 406, (nature of right of *khudkhast* raiyat); Fifth Report, Appendix No. 5, Paragraph 75. Baden Powell's Land System in British India; Vol. I, Chap. IV. p. 215, paragraph 2, p. 219; Fields Introduction to the Regulations, p. 21 Sec. 27 (foot note).

Occupancy right, a personal right.

The nature of the right has not been altered, although some improvements were effected in some respects by subsequent statute.

The Permanent Settlement did not affect the pre-existing rights of the *khudkasht* raiyat and the Regulations recognise these customary rights. Section 15 clause (7) of Regulation VII of 1799 speaks of resident cultivator having a customary right of occupancy without any right of property or transferable possession.

[C. J.—Do you maintain that there is no right of alienation at all?]

Yes. The right of occupancy is a personal right to be acquired and enjoyed by the cultivator. The *khudkasht* or resident raiyat had by the custom of the country, a right of occupancy. The incident of saleability would be inconsistent with the nature of that right. For example, a non-resident person might become the purchaser of the right which could only be enjoyed by the resident cultivator. See the judgment of Steer J. in *Thakooranee Dessee* v. *Bisheshur* (1). Up to the passing of the Bengal Tenancy Act, the remedy for non-payment of rent in the cases of *khudkasht* raiyats and raiyats having a right of occupancy, was ejectment and not sale: see Regulation VII of 1799, section 15 cl. (7).

[C. J.—Was it not a more drastic remedy than a sale, considering that plenty of land was available and none to cultivate it.]

It is doubtful whether ejectment was more drastic than sale at the time.

(1) (1865) 3 W. R. Act X, 29 (93); B. L. R. Sup. vol. 202.

[C. J.—Refers to Constructions No. 890, dated 1834 at p. 177, of the Constructions Vol. II referred to in *Prosonokumar Tagore* v. *Rammohun* (1), as showing that the right of a *jotedar* can be sold in execution of a decree if the zemindar does not object.]

Submits that the letter in reply to which the construction was given is not printed and there is nothing to show what class of tenancy is meant by the term 'jote' and under what circumstances the question arose The jote referred to in the Construction which was given in answer to a question from Judges, may, for aught we know, have been a jote transferable by custom. In those days, the distinction between tenure and a raiyati as now understood, was not known. It may even have been a transferable tenure. Refers in this connection to the argument of Babu Rama Prasad Roy in *Prosonkoomar Tagore* v. *Rammohun Doss* (1).

That the jote of a cultivating raiyat was not considered saleable in many districts, also appears from other Constructions. Refers to Construction No. 702, dated 1832 at p. 47, Vol. II which was re-affirmed in Construction No. 1205, dated 1839 at page 47, para 4. Also refers to *Moulvee Ubdoollah* v. *Rumzoo Dye* (2) and *Tirthanund* v. *Mutty Lall* (3).

Act X of 1859 did not change the incidents of a right of occupancy, but defined the mode of acquisition of occupancy right by abolishing the necessity of residence in the villages for acquisition : *Thakooranee* v. *Bisheshur* (4).

Refers to sections 6, 78, 105 of Act X of 1859 and the corresponding sections 6, 52 and 59 of Act VIII (B. C.) of 1869. Under those sections, the holding of an occupancy raiyat was not saleable even in execution of a rent decree.

On the question of transferability of occupancy holdings under Act X of 1859, refers to *Sreeram* v. *Bissonath* (5) ; *Watson* v. *Ranee Shurut Soondures* (6) ; *Ajoodhya* v. *Imam Bandi* (7) ; *Sukodra* v. *Mr. Maxwell Smith* (8) ; *Bootee Singh* v. *Moorut Singh* (9) ; *Nurendro* v. *Ishan* (10) ; *Doorga Soondures* v. *Brindabun* (11) ; *Nunkoo* v. *Mohabeer* (12) ; *Unnopoorna* v. *Ooma Churn* (13) ; *Mussamut Shunkurputtee* v. *Mirza* (14) and *Tumeezoodden* v. *Lukhee* (15) ; *Sukodra* v. *Maxwell Smith* (8) and *Nurendro* v. *Ishan* (10), which

(1) (1855) Beng. S. D. A. R. 14. (2) (1847) 7 Sel. Rep. 371.
(3) (1878) I. L. R 3 Calc. 774.
(4) (1865) 3 W. R Act X. 29 ; B. L. R. Sup. vol. 202.
(5) (1865) 3 W. R Act X. 2. (6) (1867) 7 W. R. 395.
(7) (1867) 7 W. R 328 ; B. L. R. Sup. vol. 725.
(8) (1873) 20 W. R. 139. (9) (1873) 20 W. R. 478.
(10) (1874) 22 W. R. 22 ; 13 B. L. R. 274. (11) (1869) 11 W. R. 162.
(12) (1869) 11 W. R. 405. (13) (1872) 18 W. R. 55.
(14) (1872) 18W. R. 507. (15) (1876) 25 W. R. 104.

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fully support my contention. Although the question arose between the landlord and the transferee of the raiyat, the decisions were based on the broad ground that the right of occupancy was a mere personal right something in the nature of *profit a prendre* and was therefore incapable of transfer. This principle has also been recognised by the Privy Council in *Chandrabati* v. *Harrington* (1). Also refers to *Madhu* v. *Kamini* (2). According to the contention of the appellant non-transferable means transferable if the landlord does not object.

[C. J.—Refers to section 183, Bengal Tenancy Act III (1) as indicating that apart from custom, occupancy raiyats can sell their holdings with the landlord's consent.]

That is only an illustration of one of the customs that are not inconsistent with the Bengal Tenancy Act. Section 6 of the Transfer of Property Act refers to non-transferable right of occupancy without any qualifying words indicating that it is transferable with the landlord's consent.

[C. J. The Transfer of Property Act is of much wider application than the Bengal Tenancy Act.]

The Bengal Tenancy Act has again changed the mode of acquisition of occupancy right and made it easier to acquire occupancy right than the Act X but has not altered its incidents except as specifically provided in section 65, so that there can be no ejectment of an occupancy raiyat for arrears of rent as formerly, but now the arrears can be realised by sale of the holding. Apart from this an occupancy holding is not transferable except by custom as before. Except in execution of a decree for rent, an occupancy holding cannot be sold at all. Refers to *Bhiram Ali* v. *Gopi Kanth* (3) which follows *Nurendro* v. *Iskan* (4). Submits that the principle laid down in *Bhiram Ali's case* (3) is a sound one and has been followed for a quarter of a century in numerous decisions of this Court. See *Durga Charan* v. *Kali Prasanna* (5); *Gakar Khalipa* v. *Kasi Muddi* (6); *Majed Hossein* v. *Raghubur Choudhury* (7); *Sita Nath* v. *Atmaram* (8); *Sadagar Sircar* v. *Krishna Chandra* (9); *Jarip* v. *Ram Kumar* (10); *Murallah* v. *Burullah* (11): *Peary Mohan* v. *Jote Kumar* (12); *Agarjan Bibi* v. *Panaulla* (13); *Khodabux* v. *Sader*

(1) (1890) I. L. R. 18 Calc. 349; L. R. 18 I. A. 27.
(2) (1905) I. L. R. 32 Calc. 1023.
(3) (1897) I. L. R. 24 Calc. 355.
(4) (1874) 22 W. R. 22; 13 B. L. R. 274.
(5) (1899) I. L. R. 26 Calc. 727.
(6) (1899) I. L. R. 27 Calc. 415.
(7) (1899) I. L. R. 27 Calc. 187.
(8) (1900) 4 C. W. N. 571.
(9) (1899) I. L. R. 26 Calc. 937.
(10) (1899) 3 C. W. N. 747.
(11) (1905) 9 C. W. N. 972.
(12) (1906) 11 C. W. N. 83.
(13) (1910) I. L. R. 37 Calc. 687; 12 C. L. J. 169.

Pramanik (1); *Mur Mia* v. *Chandra Mohan Ray* (2); *Rupjan Bibi* v. *Kumar Satya Sankar Ghosal* (3); *Lala Deosaimlal* v. *Bateswar* (4).

Stare decisis.

This long series of decisions by eminent Judges who have never questioned the correctness of, but have sometimes given reasons in support of the decision. *Bhiram Ali* v. *Gopi Kanth* (5) should not be disturbed at this distance of time. This shows that the decision in *Bhiram Ali* v. *Gopi Kanth* (5) is presumably correct. Even if it be logically incorrect, it should not be disturbed at this distance of time. To overrule these cases would be to make the confusion in the law relating to agricultural tenancies in Bengal worse confounded.

These cases recognise the policy of the law in an agricultural country like Bengal to protect the cultivators, from the clutches of rapacious money-lenders, who are notoriously unscrupulous and want to keep agricultural lands in their hands. To hold that occupancy holings can be sold at the will of the landlord, is to throw the raiyats entirely at the mercy of the latter and to take the agricultural lands from the hands of the raiyats and to reduce them to the condition of labourers. The resident cultivator had under the customary law of the country and the occupancy raiyat has under the Bengal Tenancy Act, the right to cultivate the land so long as he pays the rent. No one can deprive him of that right. Refers to section 60 of the Civil Procedure Code, Provisos (b) and (c) which show that the agriculturist is given special protection by the law. His cattle, implements, house, building and the land on which it stands, cannot be sold in execution of a decree. It would frustrate the policy of the law if the land which he is to cultivate with his cattle, impliments etc. were to be sold away.

[C. J.—If occupancy right is not transferable at all, how does a purchaser under a voluntary sale get a title ?]

Estoppel: Waiver.

The authorities show that voluntary sales have been held binding on the raiyat and his representative, not on the ground that title passes to the transferee, but on the ground of what has been called estoppel or on the principle that a grantor cannot derogate from his own grant or on the ground of equity and good conscience. See *Sukodra* v. *Maxwell Smith* (6); *Nurendra* v. *Ishan* (7); *Bhagi-*

(1) (1910) 10 I. C. 417.
(2) (1913) 23 I. C. 939.
(3) (1915) 19 C. W. N. CXVL.
(4) (1916) 23 C. L. J. 559.
(5) (1897) I. L. R. 24 Calc. 355.
(6) (1873) 20 W. R. 139.
(7) (1874) 22 W. R. 22 (25, 26), 13 B. L. R. 274.

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rath Changa v. *Hafizuddin* (1); *Ram Prosad* v. *Jawahir* (2); *Samiruddin* v. *Benga* (3); *Ayenuddin* v. *Srish* (4); *Syama Charan* v. *Mokshoda Sundari* (5); *Ambica* v. *Aditya* (6); and *Mohapatra* v. *Akkoy Narayan* (7).

Involuntary sales have been held to be binding on the ground of waiver and acquiescence, where the raiyat, with knowledge, omits or fails to set aside the sale. This has been fully explained in the case of *Agarjan Bibi* v. *Panaulla* (8).

[*Fletcher, J.*—How can there be any estoppel when there is no misrepresentation and how can waiver or acquiescence validate a void transaction.]

Refers to *Amulya Ratan* v. *Tarini Nath* (9); *Kunja Lal* v. *Umesh Chandra Roy* (10) and *Umesh Chandra Datta* v. *Joynarain Das* (11) where bequests of occupancy holding have been held to be not binding on the heir-at-law, on the ground that being voluntary transfers without consideration, the doctrine of estoppel does not apply. In the last case waiver and acquiescence have been stated to be the grounds on which execution sales have been held to be binding. The case of *Beharilal Ray* v. *Sindhubala Dassi* (12); took a slightly different view in respect of a gift of an occupancy holding which has been placed on the same footing as a transfer for value. Moreover, there may be an implied representation that the holding is transferable either by contract with the landlord or by custom or otherwise.

[C. J.—On that principle can you support the proposition that an occupancy holding which can be sold by a conveyance by the raiyat, cannot be sold at an execution sale ?]

Voluntary and involuntary alienations.

A voluntary sale of an occupancy holding by a raiyat, does not really pass any title to the purchaser, but is only held binding on the raiyat, on the ground of what has been called estoppel. Even assuming that the raiyat can sell it voluntarily, an occupancy holding is not saleable in execution, because the law of this country gives special protection to raiyats, which is recognized in section 60 of the Code of Civil Procedure.

(1) (1900) 4 C. W. N. 679.
(2) (1907) 7 C. L. J. 72 : 12 C. W. N. 899.
(3) (1909) 13 C. W. N. 630. (4) (1906) 11 C. W. N. 76.
(5) (1911) 13 C. L. J. 481 ; 15 C. W. N. 703.
(6) (1902) 6 C. W. N. 624. (7) (1911) 10 I. C. 530.
(8) (1910) I. L. R. 37 Calc. 687 ; 12 C. L. J. 169.
(9) (1914) I. L. R. 42 Calc. 254 ; 21 C. L. J. 187 ; 18 C. W. N. 1290.
(10) (1914) 18 C. W. N. 1294. (11) (1917) 22 C. W. N. 474.
(12) (1917) 22 C. W. N. 210.

[C. J.—How can an execution sale which, on your contention, passes no title at all, become by waiver or acquiescence, binding on the judgment-debtor, who made no representation, express or implied, whatever ?]

By reason of section 47 of the Civil Procedure Code. As between parties to the suit, the question can only be decided by the executing Court and not by a subsequent suit. The house of an agriculturist is, by reason of section 60, Civil Procedure Code, not saleable in execution of a decree ; but if it is sold without objection by the agriculturist, he cannot afterwards resist the purchaser on the ground that what has been sold, was non-saleable : *Pandurang Balaji* v. *Krishnaji Govind* (1).

Landlord's right of *khas* possession has been placed on the ground, not of forfeiture, but of abandonment : *Sukodra* v. *Maxwell Smith* (2) ; *Nurendro* v. *Ishan* (3) ; *Ram Chunder* v. *Bholanath* (4) ; *Dwarka Nath* v. *Hurrish* (5) ; *Srishteedhur* v. *Murari Sirdar* (6) ; *Lal Mamud* v. *Arbullah* (7) ; *Samujan Roy* v. *Munshi Makton* (8) ; *Ramprasad* v. *Jawahir* (9) ; *Sheikh Chand Pramanik* v. *Romoni* (10). As between the purchaser of an occupancy holding and a trespasser, there is no reported case, where the question has arisen. The case of *Basarat* v. *Sabulla* (11) was not a case of sale of an occupancy holding, but of a tenancy at will, and was based on the ground of equity as explained in *Omar* v. *Basirudeen* (12). The whole case law is based on the doctrine that an occupancy holding, apart from custom, is not saleable at all so as to pass title to the purchaser, except in execution of a rent decree.

The Full Bench case of *Dayamayi* v. *Ananda Mohan* (13), has adopted the view taken in *Bhiram Ali* v. *Gopi Kanth* (14), which has been uniformly followed for 24 years without dissent. The only case where a different view has been taken, is that of *Ananda* v. *Rutnakar* (15), which takes the opposite view without, however, dissenting from *Bhiram Ali's case* (14), and the long series of decisions following it. Mr. Justice Ghosh was also one of the Judges who decided

(1) (1903) I. L. R. 28 Bom. 125. (2) (1873) 20 W. R. 139.
(3) (1874) 22 W. R. 22 ; 13 B. L. R. 274.
(4) (1874) 22 W. R. 200. (5) (1879) I. L. R. 4 Calc. 925.
(6) (1883) I. L. R. 9 Calc. 648. (7) (1896) 1 C. W. N. 198.
(8) (1900) 4 C. W. N. 493.
(9) (1907) 7 C. L. J. 72 ; 12 C. W. N. 899.
(10) (1913) 17 C. W. N. 1105. (11) (1898) 2 C. W. N. CCLXXIX.
(12) (1908) 7 C. L. J. 282.
(13) (1914) I. L. R. 42 Calc. 172 ; 20 C. L. J. 52.
(14) (1897) I. L. R. 24 Calc. 355. (15) (1903) 7 C. W. N. 572.

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Durga Charan v. *Kali* (1); and *Majed* v. *Raghubur* (2). He took two irreconcileable views in the two cases. *Annada* v. *Rutnakar* (3) has never been really followed. An examination of *Dwarka Nath Misser* v. *Tarini Sankar Roy* (4) will show that the only decision was, that the raiyat not having objected at the proper time, cannot after confirmation of sale, resist the purchaser, thus following *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (1). *Shakaruddin* v. *Hemangini* (5) is not an authoritative decision on the question of law. The Judges, in view of the state of authorities, with great hesitation, declined to interfere. The decision was wrong in view of the long series of previous decisions. In *Dwarka Nath* v. *Hurrish Chunder* (6), the raiyat not having objected to an execution sale but having taken an under-tenant, was held to have lost his right and the landlord was held entitled to *khas* possession. In the case of *Palakdhari* v. *Manners* (7), the remarks are *obiter dicta*. The question decided was, whether there was a custom of transferability without landlord's consent proved and the instances of sales at the instance of landlord decree-holder, do not appear to have been objected to by the Court.

The learned Judges who decided the Full Bench case of *Dayamayi* v. *Ananda Mohan* (8), after hearing the elaborate arguments that were addressed to them, came to the conclusion that according to the earlier authorities, an occupancy holding is not transferable at all but that the later decisions have upheld voluntary transfers for value. The grounds on which these later decisions were based, were probably not entirely correct logically. But they recognized the supreme necessity of upholding long established decisions. They therefore pointed out that life of law is not logic but experience and laid down certain very carefully worded propositions in which they held, that transfers are operative against the raiyat—not that title passes to the purchaser (a) when made voluntarily and (b) when made involuntarily and the raiyat with knowledge omits or fails to set it aside, thus affirming the long series of decisions which I have mentioned before, in which it has been held that a right of occupancy is a personal right and so not transferable at all, but that transfers for value are binding between the parties and that an occupancy holding cannot be sold in execution of a decree for

(1) (1899) I. L. R. 26 Calc. 727. (2) (1899) I. L. R. 27 Calc. 187.
(3) (1903) 7 C. W. N. 572.
(4) (1907) I. L. R. 34 Calc. 199; 5 C. L. J. 294: 11 C. W. N. 513.
(5) (1911) 16 C. W. N. 420. (6) (1879) I. L. R. 4 Calc. 925.
(7) (1895) I. L. R. 23 Calc. 179
(8) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52; 18 C. W. N. 971.

money, if the raiyat objects in proper time. The language of that judgment does not bear any other interpretation.

The cases of *Narayani* v. *Nabin Chandra* (1), and *Badarennessa* v. *Alam Gasi* (2), necessarily follow from the decision of the Full Bench in *Dayamayi* v. *Ananda Mohan* (3), and adopt the same view as *Bhiram Ali* v. *Gopi Kanth* (4). These cases have, in their turn, been followed by *Ramsundar* v. *Lochan* (5); *Swarnamoyi* v. *Adu* (6); *MacPherson* v. *Debibhusan* (7); *Bepin* v. *Jagat* (8); *Rani Hemanta Kumari* v. *Dagu Mandal and others* (9); *Birendra Nath Roy Chowdhury* v. *Ramesh Chandra Pal* (10).

A consideration of section 25 and other sections of the Bengal Tenancy Act, also leads to the conclusion that the said Act has not made an occupancy holding transferable apart from custom except in execution of a rent decree.

The cases relied on by the appellant, do not support the conclusion that non-transferable means not transferable only if the landlord objects. The English and American authorities cited, have no bearing on the question, which must be decided with reference to the land law peculiar to their country.

Stare decisis:

As to the importance of upholding decisions which have laid down a principle and have been accepted as good law for a long time, see *G. & C. Kreglinger* v. *New Patagonia Meat and Cold storage Co.* (11); *In re Hallet's Estate* (12); *Owners of Steamship the Mediana* v. *Owners Masters and Crew of Lightship* (13).

If this long series of decisions be reversed, many existing titles will be upset.

[C. J.—No titles will be upset; we shall only be removing a fetter.]

The heirs at law who have under the decisions in *Amulya Ratan* v. *Tarini* (14); *Kunja Lal* v. *Umesh* (15) and *Umes* v. *Jaynath* (16)

(1) (1916) 25 C. L. J. 351; 21 C. W. N. 400.
(2) (1915) 21 C. L. J. 650; 19 C. W. N. 814.
(3) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52; 18 C. W. N. 971.
(4) (1897) I. L. R. 24 Calc. 355. (5) (1916) 38 I. C. 942.
(6) (1916) 39 I. C. 119. (7) (1917) 2 Pat. L. J. 530.
(8) (1919) 23 C. W. N. LXXXIV.
(9) A. O. O. Nos. 342 & 401 of 1917, decided by Teunon & Cuming JJ.
(10) A. O. O. No. 490 of 1915, decided by Fletcher & Richardson, JJ.
(11) (1914) A. C. 25 (40). (12) (1879) 13 Ch. D. 696.
(13) (1900) A. C. 113.
(14) (1914) I. L. R. 42 Calc. 254; 21 C. L. J. 187; 18 C. W. N. 1290.
(15) (1914) 18 C. W. N. 1294. (16) (1917) 23 C. W. N. 474.

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have been granted decrees against legatees of occupancy holdings will, if the basis of those decisions be declared to be erroneous, be unable to recover possession in case of dispossession by trespassers. Many other similar difficulties are bound to arise.

This non-saleability of an occupancy holding—this disability—is really a privilege. This right to object to a sale in execution of a decree for money, is a right peculiar to the occupancy raiyat. It is part of the fixing of tenures enjoyed by him—part of the privilege annexed to his status.

To depart from the long series of cases affirming this right, would be to abrogate the common law of the country viz. that the raiyat who has acquired a right of occupancy, has a right to cultivate the land as long as he pays the rent. The judgment-debtor in this case is willing to pay his rent: If he does not pay his debt, you may send him to jail but don't touch his occupancy holding. It is sacred.

Stare decisis:

Dr. Dwarka Nath Mitter in reply: The burden of argument of the other side is that the principle contended for on behalf of the respondent, has been followed in so many cases that it would not be proper to disturb the law now. In the first place, there is no such current of authority in favour of the contention that the raiyat is entitled to object. This was first laid down in *Bhiram Ali's case* (1) in 1897. In 1903, in *Ananda* v. *Rutnakar* (2), decision was given the other way. This decision was followed up till the decision in *Dayamayi* (3). So the principle was recognised, if at all, during a period of 5 years, from 1897 to 1902. It is now also clear that the view contended for on behalf of the appellant, was all along recognised from the days of the Sudder Dewany up till 1897. Construction No. 890 (1834) has now placed the matter beyond all doubt. The position, therefore, is, the view I am contending for, was the law all along; the other view was laid down for the first time in 1897; it was given up again in 1903. So, it is submitted, that in so far as any argument can be based on the principle of *stare decisis*, it is in favour of the appellant.

In the next place, no objection on the ground of *stare decisis*, ought to stand in the way of matters being set right, more especially when the result of so doing, would be to remove and not to impose a fetter:

Mersey Docks v. *Cameron* and *Jones* v. *Mersey* (4).

(1) (1897) I. L. R. 24 Calc. 355. (2) (1903) 7 C. W. N. 572.
(3) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.
(4) (1865) 11 H. L. C. 443 (509).

"But when an appeal from any of their judgments is made to this House, however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of *stare decisis*, refuse to examine the foundation upon which they rest. That would not, in my opinion, have been the duty of your Lordships even if the current of the decisions had been uniform..."

Andrews v. *Gas Meter Company* (1): "If by declining to follow the second decision in *Hutton* v. *Scarborough Cliff Hotel Co.* (2), we were disturbing title or embarrassing trade or commerce we should treat it as one of those decisions which though wrong it would be mischievous to overrule. But such is not the case; and it is desirable from all points of view to remove from companies a fetter which ought never to have been imposed upon them and which in practice has been got rid of by skilled draftsmen by the insertion of power to issue preference shares in the original articles of association or the memorandum of association itself. These devices will no longer be necessary."

West Ham Union v. *Edmonton union* (3). "Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them."

Balasu v. *Balasu* (4): "And so far as the fear of disturbance can effect the question, if it can rightly affect it at all, it inclines in favour of the law which gives freedom of choice. People may be disturbed at finding themselves deprived of a power which they believed themselves to possess and may want to use. But they can hardly be disturbed at being told that they possess a power which they did not suspect and need not exercise unless they choose. And so with titles."

Not a personal Right:

By the expression 'personal right' in some of the cases (*Nurendra* v. *Ishan* (5)) the learned Judges did not intend to say that it was

(1) (1897) 1 Ch. 361 (371).
(2) (1865) 2 Dr. & Sm. 521.
(3) (1908) A. C. 1 (4, 5).
(4) (1898-99) I. L. R. 22 Mad. 394 (430); L. R. 26 I. A. 113.
(5) (1874) 22 W. R. 22; 13 B. L. R. 274.

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an absolutely inalienable right. It must be taken with reference to the facts of those cases. The distinction between proprietary right and personal right is very important. Salmond, in his Jurisprudence (fifth edition p. 208), says "What then, is the essential nature of this distinction? It lies in the fact that proprietary rights are valuable and personal rights are not. The former are those which are worth money; the latter are those that are worth none. The former are the elements of a man's wealth; the latter are merely elements in his well-being. The former possess not merely juridical but also economic significance; while the latter possess juridical significance only."

The word *personal*, by itself, does not support the contention of the other side. As Salmond points out in his Jurisprudence (5th edition, page 208 foot note) it is used in several different senses. "It is a misfortune of our legal nomenclature that it is necessary to use the word *personal* in several different senses. The context, however, should in all cases be sufficient to indicate the particular signification intended."

What Sir Richard Couch meant by saying in *Nurendro* v. *Ishan* (1) that occupancy right is not transferable, is clear from the judgment of the same learned Chief Justice in *Kripa Nath Chakes* v. *Dyal Chand Pal* (2) decided shortly after that Full Bench case. Sir Richard Couch said "The consequence of this is that Anund Moyee might be considered by the landlord as still liable to pay the rent, because the landlord does not appear to have in any way recognised the transfer or done anything which could amount to an acceptance of the land or allowing the tenancy of Anund Moyee to be given up." Submits that it is clear that Sir Richard Couch when he said that occupancy right was not transferable, meant that it was not transferable, except with the consent of the landlord.

Mr. Justice Phear in *Sukodra* v. *Smith* (3) at p. 140, compares the interest of an occupancy raiyat with servitude. With great respect, it is not correct to say so. An occupancy right is more like the emphyteusis of Roman law. The distinction between emphyteusis and servitude is considered by Solm in his Institutes of Roman Law (Ledlie, 3rd edition p. 350) thus: "As compared with servitudes, there are three points which distinguish emphyteusis: (*a*) the emphyteuta stands, not only practically but in the main, also legally in the position of an owner; emphyteusis

(1) (1874) 22 W. R. 22; 13 B. L. R. 274.
(2) (1874) 22 W. R. 169 (170).
(3) (1873) 20 W. R. 139 (140).

therefore confers a considerably wider range of rights than any of the servitudes: it is intended to take the place of ownership; (*b*) emphyteusis is heritable and alienable; (*c*) an emphyteuta who actually exercises his right has (according to the true view) juristic possession of the land: a person who exercises a servitude has only juristic possession of the right.....what he possesses is not the land but the servitude e.g. the right of way. An emphyteuta excludes the owner from the land; the exercise of a servitude by another does not affect the owner's possession of the land."

Both under Act I of 1845 and Act XI of 1859, occupancy right has been treated as an encumbrance. It is, thus, a proprietary right. Refers to section 26 of the Bengal Tenancy Act ".....descend in the same manner as *other immovable property*." Occupancy right was, thus, recognized as immovable property, by the legislature.

Section 65 provides that non-transferable right also can be sold in execution of a decree for rent. This indicates the nature of the right. If it were absolutely inalienable, it could not be sold.

Section 73 also contemplates transfer.

Then, the raiyat can surrender; sublet. This indicates that the right is transferable.

Section 183 also recognises transferability.

Hence the occupancy right, whatever might be its nature before, can no longer be regarded as a mere personal right.

As to the effect of section 25 of the Bengal Tenancy Act, it applies to landlord as landlord.

No distinction can therefore be made between voluntary alienation and involuntary alienation. If it can pass by a conveyance, it may be sold in execution. If consent of the landlord would validate the transfer in the former case, it would do so in the latter.

C. A. V.

The following judgments were delivered

June, 1.

Mookerjee, A. C. J.:—This is an appeal by a decree-holder from an order made by the Court of appeal below in affirmance of an order of dismissal passed by the primary Court on an application for execution of a decree. The applicants hold a decree for money against the respondent, and in execution of that decree they have attached his holding. It so happens that the applicants are the landlords of the respondent who is a raiyat with right of occupancy in the attached holding. His objection is that the holding is not transferable by custom or local usage and cannot be sold in execution of the decree held by the applicants. The Courts

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below have given effect to this objection and have held that a non-transferable occupancy holding cannot, if the raiyat objects, be sold in execution of a decree for money, even though the decree-holder be the sole landlord of the raiyat. There is no authority in this Court which explicitly affirms this proposition; but the question was raised and decided in *MacPherson* v. *Debibhusan* (1), where it was ruled that even a sole landlord cannot in execution of a money decree sell his raiyat's occupancy holding if the raiyat objects, unless the holding is transferable by custom or local usage. This decision of the Patna High Court is not binding upon this Court as an authority. But it was argued on behalf of the judgment-debtor before the Division Bench which heard the present appeal in the first instance, that the view taken in the case just mentioned is a logical deduction from the rule recognised in *Narayani* v. *Nabin Chandra* (2), as derivable from the propositions enunciated by the Full Bench in *Dayamayi* v. *Ananda Mohan* (3), which, again, it was contended, substantially adopted the principle laid down in *Bhiram Ali* v. *Gopi Kanth* (4). On the other hand, it was argued before the Division Bench on behalf of the decree-holder, that a contrary view was deducible from other decisions of this Court which had never been expressly overruled, such as *Ananda Das* v. *Ratnakar* (5), and *Shakaruddin* v. *Hemangani* (6). In view of this conflict of judicial opinion, the Division Bench has referred the following question for decision by a Full Bench:

"Is the sole landlord of a raiyat competent to sell, in execution of a money decree against the raiyat, his occupancy holding, unless the holding is transferable by usage or custom?"

When the case was opened before the Full Bench, it became manifest that the decision in *Dayamayi* v. *Ananda Mohan* (3), itself might require examination, as, indeed, would be plain from the following sequence of propositions:

(1) In the absence of custom or local usage to the contrary, a raiyati holding, in which the raiyat has only a right of occupancy, is not saleable at the instance of the occupancy raiyat or any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent: *Bhiram Ali* v. *Gopi Kanth* (4).

(1) (1917) 2 Pat. L. J. 530.
(2) (1916) 25 C. L. J. 351; 21 C. W. N. 400.
(3) (1914) I. L. R. 42 Calc. 172 F. B.; 20 C. L. J. 52 F. B.
(4) (1897) I. L. R. 24 Calc. 355.
(5) (1903) 7 C. W. N. 572.
(6) (1911) 16 C. W. N. 420.

(2) A judgment-debtor whose occupancy holding, though not transferable by custom or local usage, is sought to be sold in contravention of the above rule, may object to the proposed sale if he is aware of the execution proceeding; otherwise, if a sale takes place, he may object, even after the confirmation of the sale, when possession is delivered to the execution purchaser: *Durga Charan* v. *Kali Prasanna* (1).

(3) In transfers, for value, of occupancy holdings, apart from custom or local usage, the transfer is operative, (a) as against the raiyat, when it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside, and (b) as against the landlord in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent: *Dayamayi* v. *Ananda Mohan* (2).

(4) An occupancy holding which is not saleable by custom or local usage cannot be sold in execution of a decree for money obtained against the raiyat, when the raiyat objects, even if all the landlords give their consent to the sale: *Narayani* v. *Nabin Chandra* (3).

(5) The sole landlord of a raiyat cannot, if the raiyat objects, sell his occupancy holding in execution of a money decree, unless the holding is transferable by custom or local usage: *MacPherson* v. *Debibhusan* (4).

It is indisputable that the appellant before us, in order to succeed, must assail the decision in *Bhiram Ali* v. *Gopi Kanth* (5), and also the Full Bench decision in *Dayamayi* v. *Ananda Mohan* (2), to the extent that it accorded approval to the substance of the principle embodied in that case. In these circumstances, this Special Bench has been constituted to consider the question referred, so that we may be free, in accordance with the rules of the Court, to examine the correctness of the Full Bench decision in *Dayamayi* v. *Ananda Mohan* (2), in so far as it affects the present matter. Consequently, as might have been anticipated, the elaborate arguments addressed to us on the question of the nature and incidents of occupancy right have centred round the decision in *Bhiram Ali* v. *Gopi Kanth* (5). On the one hand, it has been maintained by the decree-

(1) (1899) I. L. R. 26 Calc. 727.
(2) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.
(3) (1916) 25 C. L. J. 351; 21 C. W. N. 400.
(4) (1917) 2 Pat. L. J. 530.
(5) (1897) I. L. R. 24 Calc. 355.

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holder that it departed on erroneous grounds from what was, at the time, really well-settled law; it has been contended, on the other hand, that it merely gave effect to what had been the accepted view on the subject from the date of the Permanent Settlement.

The earliest judicial pronouncement on the subject of transferability of a raiyati holding, which we have been able to trace is contained in Construction No. 890, dated the 11th July, 1834, issued by the Bengal Sudder Dewani Adawlut, in the case of *Neelkanth Roy, Plaintiff, Decree-holder* v. *Casheenauth Ghose, Defendant Judgment-debtor.* The petitioner requested "To know whether the jote jamma of the latter (defendant) can be disposed of in satisfaction of a decree obtained against him for Rs. 732 under Regulation 4 of 1793" (Sudder Diary, 1834, p. 268). The construction was addressed to the Judge of zillah Jessore who had forwarded the petition and is in the following terms:

"1. I am directed by the Court to acknowledge the receipt of your letter of the 24th ultimo and its enclosure requesting the Court's opinion as to the liability of the jote jama of a raiyat to be sold in execution of a money decree, provided the zemindar do not object to the measure.

"2. In reply I am directed to inform you that the Court are of opinion, that the rights and interests of the jotedar may be sold in satisfaction of a decree."

It is important to bear in mind that this construction was not a casual expression of opinion by the Sudder Dewani Adawlut, but was a deliberate determination upon a question of law in the performance of a statutory duty imposed on the Judges. The framers of the Bengal Regulations, in their desire to secure certainty and uniformity in the administration of the law, took appropriate measures which may perhaps have been forgotten at this distance of time and may be usefully recalled here. Regulation 41 of 1793, passed on the 1st May, 1793, embodied rules for the construction of the Regulations. Regulation 10 of 1796 passed on the 7th October, 1796, was framed for the guidance of the Courts of justice in cases of a difference of opinion on the meaning and construction of the Regulations. Section 2 of this Regulation authorised Zilla and City Judges and Magistrates to state objections to precepts of the Provincial Courts or Courts of Circuit, if they considered such precepts to be contrary to or unwarranted by the Regulations. If the Provincial Courts or Courts of Circuit, in reply to the objections, confirmed the first precept in whole or in part, the Zilla or City Judge or Magistrate was bound to comply with the requisition. But the

Zilla or City Judge or Magistrate was at liberty to request a reference to the Sudder Dewani or Nizamat Adawlut according as the case in question related to the Civil or Criminal department. Section 3 next provided that, on such reference, the determination of the Sudder Dewani or Nizamat Adawalut was to be held final and conclusive. Section 4 then laid down that if the Suddur Court should consider that the matter was doubtful or that the Regulations did not sufficiently provide for the case submitted for their decision, the Judges should report the matter to the Governor-General in Council, so that a new Regulation might be framed in explanation of the doubt or to cover cases of that description. In performance of the important duty thus imposed on the Sudder Courts, the Judges, from time to time, issued constructions which were held final and conclusive by all subordinate Courts. The first of these constructions was issued on the 3rd May, 1798, and so far as information is now available, the last (No. 1415) on the 19th July, 1847. By Regulation 6 of 1831, a Sadar Dewani and Nizamat Adawlut was established at Allahabad for the Western Provinces with effect from 1st January, 1832, and we find it frequently noted, with regard to individual constructions issued thereafter by the Calcutta Court or by the Western Court, respectively, that the Western Court or the Calcutta Court, as the case might be, concurred in the construction. Collections of these constructions were from time to time issued under the authority of Government; the standard edition is that in three volumes published during 1833-1844; a later edition in two volumes was brought out by Mr. C. T. Buckland in 1855.

The circumstances under which the question raised by the Judge of Jessore came to be decided by the Sudder Court may now be briefly stated. The rules of procedure applicable to civil suits were embodied in Regulation 4 of 1793 as subsequently modified by Regulation 26 of 1814. Section 7 of Regulation 4 of 1793 prescribed the mode of execution of decrees in the following terms:

"The Court is then to cause the decree to be executed, if it be for a zemindary, independent or dependent talook, or other estate or real property, by causing possession of the property to be delivered to the person to whom it may be decreed; if it be for personal property or a sum of money, by causing the specific thing to be delivered, or the value of it, or the sum of money decreed, to be levied by public sale by auction of a sufficient portion, or if requisite for the satisfaction of the decree, the whole of the lands, houses, and all the other effects either real or personal, belonging to the party against whom the judgment may have been given, or by the

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attachment of his person, or where it may be necessary, both by the sale of his property and effects, and the attachment of his person."

This provision was left unaffected by clause 7 of section 15 of Regulation 26 of 1814, which provided that the Court, after causing the purport of the petition for execution to be compared with the decree contained in the original record of the suit, should proceed to execute the same in conformity with the provisions which were then in force or which might thereafter be enacted. Consequently, under section 7 of Regulation 4 of 1793, the decree-holder might, *prima facie*, in execution of a decree for money against a raiyat with right of occupancy, levy the judgment debt by public sale by auction of a sufficient portion of the whole of the lands, houses and all other effects either real or personal belonging to the raiyat. A difficulty, however, might be created by reason of the phraseology used in clause 7 of section 15 of Regulation 7 of 1799, which described a lease-holder or other tenant as "having a right of occupancy only so long as a certain rent or a rent determinable on certain principles according to local rates or usages be paid, without any right of property or transferable possession." No doubt, Regulation 7 of 1799 was framed, not with a view to define the status of tenants of various degrees but only to provide rules so as to enable proprietors and farmers of land to realise their rents with punctuality; still the use of the expressions just mentioned might well create a doubt and suggest the question, whether a tenant having a right of occupancy was "without a right of property or transferable possession" absolutely or only in relation to his landlord who could treat the defaulting tenure itself as forfeited by a breach of the condition for due payment of rent, no matter who might be in actual occupation.

The phraseology used in Regulation 7 of 1799 is similar to that employed by well-known writers of that generation on the subject of the land tenures of the presidency of Bengal. Thus, in para 389 of a minute recorded by Sir John Shore on the 18th June, 1789, respecting the proposed Permanent Settlement of the lands in the Bengal Provinces we find the following statement:

"It is, however, generally understood that the raiyats by long occupancy acquire a right of possession in the soil and are not subject to be removed; but this does not authorise them to sell or mortgage it, and it is so far distinct from a right of property. This, like all other rights under a despotic or varying form of Government, is precarious." (Fifth Report . . . . . edited by Firminger, Vol. II. p. 84).

But there can be little doubt that, as stated by Sir John Shore himself in para 15 of another Minute recorded on the 8th December, 1789, "The most cursory observation shows the situation of things in the country to be singularly confused; the relation of a zemindar to the Government and of a raiyat to the zemindar is neither that of a proprietor nor a vassal, but a compound of both; the former performs acts of authority unconnected with proprietary right; the latter has rights without real property; and the property of the one and rights of the other are in a great measure held at discretion." Sir John Harrington in his analysis of the Bengal Regulations (Vol. III, pages 419-463) deals with the rights of the under-tenants and quotes largely from the Minutes of Sir John Shore. There is one passage which may be usefully reproduced here from paragraphs 406 and 407 of the Minute dated 18th June, 1789 (Fifth Report, Vol. II, page 87):

"406. Puttahs to the Khode Khosht raiyats, or those who cultivate the land of the village where they reside, are generally given, without any limitation of period; and express that they are to hold the lands, paying the rents from year to year. Hence the right of occupancy originates; and it is equally understood as a prescriptive law, that the raiyats who hold by this tenure, cannot relinquish any part of the lands in their possession, or change the species of cultivation, without a forfeiture of the right of occupancy, which is rarely insisted upon; and the zemindars demand and exact the difference. I understand also that this right of occupancy is admitted to extend, even to the heirs of those who enjoy it.

"407. Pykaust raiyats, or those who cultivate the land of villages where they do not reside, hold their lands upon a more indefinite tenure. The puttahs to them, are generally granted with a limitation in point of time: where they deem the terms unfavourable, they repair to some other spot."

It is plain that a distinction was made between raiyats who cultivated the lands of the village where they resided and raiyats who cultivated the lands of villages where they did not reside; the former alone apparently had a right of occupancy. Whether in those early days, a question ever arose as to the transferability of the tenancy of a resident cultivator, except as between the raiyat and his landlord, it is impossible at this distance of time to investigate. No records are known to have been preserved of the proceedings of such Courts as existed before the re-establishment of the Sudder Dewany Adawlut in 1793, and the earliest judicial pronouncement on the subject which has been traced is contained in the Construc-

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tion dated the 11th July, 1834. The Court at the time consisted of five Judges, Rattray C. J, Shakespear, Braddon, Robertson and Smyth, JJ. some of whom had been members of the Court for several years and all of whom had considerable experience of judicial administration as covenanted servants of the East Indian Company. A pronouncement by a Court so composed must obviously carry great weight as to what was understood to be the law at that time.

On behalf of the respondent, it was argued that the Construction was intended to lay down a rule applicable only to cases where the jote jama of the raiyat was transferable by custom. There is no force in this contention, for the manifest reason that it would be wholly superfluous to lay down a rule that a transferable jote jama could be sold in execution, provided the zemindar did not object. The scope and effect of the Construction are, however, placed beyond all doubt, by a minute which was recorded by Rattray, C. J., Tucker, Reid and Dick, JJ. on the 5th December, 1845, on a reference by the Sudder Dewani Adawlut of the North-Western Provinces. The Court stated that "the phrase rights and interests was purposely employed, conveying that the rights and interests of a jotedar could be sold without determining of what they consisted, a question which could be properly disposed of only by regular suit in the civil Courts." The Court thus left any case in which the question might arise to depend upon the evidence adduced in support of either the assertion or the denial of the existence of such saleable rights and interests. The Court was, as might be anticipated, fully aware that only certain tenancies were transferable, for they proceeded to add: "It is acknowledged by the Court that there are in certain districts of Bengal and more particularly in Jessore, Faridpore and Rungpore, jote jamas, the proprietors of which have a transferable right in the soil, subject to the payment of rent to the zemindar. These tenures are saleable for arrears, and any surplus sale proceeds which may remain after satisfying the zemindar's demand, are paid to the late jotedar. The jama of such a tenure is fixed or variable according to its date being antecedent or subsequent to the Decennial Settlement. These and other points require to be determined in each case, and it cannot be said therefore that the employment of the term jotedar implies any specific rights and interests." It will be observed that Rattray, C. J. was a party to the Construction of the 11th July, 1834, as also to the explanatory memorandum of the 5th December, 1845. There can, in our opinion, be no room for doubt that the Construction was intended

to apply to all tenancies transferable or non-transferable. We may add that the Construction which was adopted by the Western Court on the 5th September, 1834, was repealed in the North-Western Provinces (Tayler, Thompson and Davidson, JJ.) on the 1st January, 1846; but it continued to be in full operation within the jurisdiction of the Bengal Sudder Dewani Adawlut.

This construction was treated as good law in the case of *Prosonokoomar Tagore* v. *Rammohun Doss* (1), decided by a Full Bench of the Sudder Dewani Adawlat (Sir R. Barlow, C. J., Raikes and Colvin, JJ.) on the 11th January, 1855. In that case, the transferee of a raiyat sued to recover possession of a jote from the landlord. The landlord contended that such sale without his permission was not good. The primary Court overruled the objection and decreed the suit. The lower appellate Court confirmed this decree. On second appeal to the Sudder Court, the question was raised, whether a raiyat could sell his jote to a third party without permission of the zemindar. On behalf of the transferee of the jote, reliance was placed upon Construction No. 890. The Court observed that the case before them was that of a private purchaser, while the construction related to the case of a purchaser at an execution sale, and then pointed out that the construction provides that the permission of the zemindar to the sale of the jote in execution of decree must be obtained. The Court accordingly held that the plaintiff's claim to possession without permission of the zemindar was invalid, and added:

"He bought as he thought something; the principle *caveat emptor* strictly applies, and it was for him to look to the certainty of getting a consideration for his purchase-money. The party whom he succeeded had no equivalent to offer, he had merely a right of occupancy so long as he paid his rents; failing to do so, either from inability or from unwillingness, the possession returned to the proprietor, the contract between him and his ryot being no longer in force. Such is the custom of the country, and none but the tenures referred to in Act I of 1845 (Revenue Sale Law, section 26) or in cases where a *bonus* has been given, thereby creating in the ryot a right in the property to that extent, are considered tenures transferable by the ryot. In support of this opinion, reference may be had to that of Harrington; see pages 434 and 450 of his Analysis, Vol. III."

The combined effect of the Construction in the case of *Neal-*

(1) (1855) Beng. S. D. A. R. 14.

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kanth v. *Cashenauth* (1), and of the decision in *Prosonokoomar* v. *Rammokun*, (2), thus was that the jote jama of a raiyat could be sold in execution of a money decree provided the zemindar did not object to the measure, and a private alienation thereof by the raiyat was invalid against the zemindar if made without his permission. Such was the law as understood and administered by the Sudder Dewani Adawlat when Act X of 1859 was placed on the Statute Book; the restraint on the raiyat against the alienation of his land, whether voluntary or involuntary, was deemed to be for the benefit of his landlord, and the fetter might be removed by the assent of the landlord. The theory that such a restraint might be imposed for the benefit of the raiyat himself, to protect him against his own improvidence, had not yet been propounded.

Before we proceed to consider the law as administered under Act X of 1859, reference may be made to a curious case, *Thakoor Sarup* v. *Smoult* (3), which was decided by the Supreme Court in 1843. That was an action of trespass, *viviet armis** brought against the Sheriff of Calcutta for wrongful execution with regard to properties in the district of Dacca. The property was in the actual occupation of raiyat, while the action was instituted by the talukdar. The counsel for the defendant argued that the talukdars were not owners of the land, but were mere Government collectors who farmed the revenue of the taluk, making the most of them from the raiyat and paying a fixed income to the Government. The counsel for the plaintiff argued that the talukdar was the party in immediate possession of the land, that the raiyat had no interest therein but was a mere cultivator of the soil; but counsel also added that the raiyat had an hereditary interest, independent of both talukdar and Government, neither of whom could displace him so long as he paid his rent. Sir Lawrence Peel C. J., with the concurrence of Sir John Grant and Sir Henry Seton, JJ. non-suited the plaintiff and observed :† "The ryot here has a better tenure than a lessee in England, and one not nearly so precarious as that of the tenant-at-will. Case was the proper remedy in this instance, for though the zemindar has no reversionary interest, he has an interest which has been injured by the tortious act of the defendant." There was manifestly much uncertainty as to the true status of the raiyat

(1) Construction No. 890. dated the 11th July, 1834.
(2) (1855) Beng. S. D. R. 14.
(3) (1843) Fulton 136.
* [Words used in indictments, &c., to express the charge of a forcible and violent committing any crime or trespass—Rep.]
† [See p. 139—Rep.]

and his relation to the zemindar in those days, and the object of the legislature was to remove these doubts, as far as practicable, by the provisions of a new and comprehensive measure.

In the Bill which subsequently became Act X of 1859, an attempt was made, for the first time, by the legislature to define the right of occupancy enjoyed by a raiyat. It was recited in the statement of objects and reasons, dated the 10th October, 1857, that the Regulation recognised the right of all resident raiyats to the occupancy of the lands cultivated by them so long as they paid the established rent. The Bill consequently contained a declaration that all resident raiyats or cultivators had a right of occupancy in the lands held or cultivated by them so long as they paid the rents legally demandable from them. Clause 4 of the Bill was framed in the following terms:

"Every resident ryot and cultivator has a right of occupancy in the land held or cultivated by him, whether it be held under pattah or not, so long as he pays the rent payable on account of the same; but this rule does not apply to khamar, neej jote or seer land belonging to the proprietor of the estate or tenure and leased for a term or year by year to a resident cultivator, nor (as respects the actual cultivator) to lands sublet to a resident cultivator by a ryot having a right of occupancy."

When however the Bill was passed into law, this provision had become materially altered and had been transformed into what is familiar to us as section 6 of Act X of 1859:

"Every ryot, *who has cultivated or held land for a period of twelve years*, has a right of occupancy in the land *so* cultivated *or held* by him, whether it be held under pottah or not, so long as he pays the rent payable on account of the same; but this rule does not apply to khamar, neej jote, seer land belonging to the proprietor of the estate or tenure and *let by him* on lease for a term or year by year nor (as respects the actual cultivator) to lands sublet *for a term or year by year* by a ryot having a right of occupancy. *The holding of the father or other person from whom a ryot inherits, shall be deemed to be the holding of the ryot within the meaning of this section.*"

It is plain on a comparison of the clause in the Bill as introduced with the section as finally enacted that the two differ on fundamental points, namely, first, the right of occupancy was recognised as attainable by all raiyats including non-resident raiyats; secondly, such right could be acquired by continuous cultivation for a period of welve years; thirdly, the right, while in process of

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growth, was transmissible by inheritance, and fourthly, there was no distinction made between resident and non-resident cultivators in respect of the private lands of the proprietor. Whether the clause in its original form or the section in its final shape represented the pre-existing law on the subject has been a matter of controversy, and there has been a marked divergence of judicial opinion on the subject, as will appear from an examination of the judgment of Sir Barnes Peacock C. J., in *Isshore Ghose* v. *Hills* (1), *and Hills* v. *Isshore Ghose* (2), and the judgment of the Mr. Justice Trevor in *Thakooranee Dosses* v. *Bisheshur Mookerjee* (3), which was heard by the Full Court and overruled the decision in *Isshur Ghose* v. *Hills* (4). We are not now concerned with the question which was considered by the Full Court, namely, the liability to enhancement of the rent of an occupancy raiyat. But the remarkable fact remains that although the question of the status of an occupancy raiyat was considered by the legislature in 1859, no attempt was made to give an exhaustive enumeration of the incidents of the tenancy and nothing was stated about transferability or even about heritability. The papers relating to the passing of Act X of 1859 as also those relating to the working of the Act were published by the Government of India in 1883. Amongst the numerous opinions recorded at the time by judicial and administrative officers as also by the Chief Justice and Judges of this Court, no trace can be found of a discussion of the question of transferability, though there are casual suggestions for the "compulsory enfranchisement of the restricted tenure of occupancy raiyats" by payment of a prescribed fee to the zemindar. When we turn to the judicial decisions, we find an almost equal paucity of authorities on the question of the transferability of occupancy holdings. As will presently be seen, whereever the question was raised, the validity of the transfer was challenged by the landlord or by a person claiming as his representative. The rule enunciated by the Sudder Court as to involuntary alienations in 1834 and as to voluntary alienations in 1855 does not appear to have been controverted in any reported decision. This is not a matter for surprise. Act X of 1859 made the status of the occupancy raiyat more certain and less precarious than it was under the Regulations. Further protection was accorded to the raiyat against various means of oppression to which zemindars

(1) (1862) Marshall 151 ; W. R. F. B. 48.
(2) (1863) W. R. F. B. 131 and (1864) W. R. F. B. 148.
(3) (1865) B. L. R. F. B. 202 ; 3 W. R. Act X Rul. 29.
(4) (1864) W. R. F. B. 148.

were accustomed to have recourse under Regulation 7 of 1799, and although the raiyat still continued liable to forfeit his tenancy for non-payment of rent, he could not be ejected otherwise than in execution of a decree or order under the provisions of the Act (section 21). It is not necessary for our present purpose to attempt a complete enumeration of all the advantages conferred on the raiyat by the legislation of 1859; it is sufficient to state that the marked improvement in the status of the raiyat steadily tended to weaken the theory, if it ever prevailed, that the right of occupancy was a purely personal right.

Amongst judicial decisions pronounced during the operation of Act X of 1859 or Act VIII of 1869 B.C., (which transferred the jurisdiction to determine disputes between landlords and tenants from the revenue Courts to the civil Courts), the most important are two Full Bench cases, namely, *Ajoodhya Pershad* v. *Imam Bandi* (1), and *Narendra Narayan Roy* v. *Ishan Chandra Sen* (2). In the first case, *Ajoodhya* v. *Imam Bandi* (1), the occupancy raiyat transferred his holding without the consent of his landlord. The landlord sued the raiyat for arrears of enhanced rent after service of the prescribed notice. The transferee intervened. The District Judge decreed the claim against the original tenant. The tenant appealed and contended on the authority of the decision in *Taramonee* v. *Birrissur* (3), that he had divested himself of all liability for rent by the transfer of his holding. The Division Bench referred the following point for the decision of a Full Bench: "Whether a tenure, not originally transferable without the consent of the landlord, become so, because the tenant had obtained a prescriptive right of occupancy." The Full Bench answered the question in the negative. Sir Barnes Peacock, C. J., held that there was nothing in section 6 of Act X of 1859 which showed that it was the intention of the legislature to alter the nature of a jote and to convert a non-transferable jote into a transferable one merely because a raiyat who held it for twelve years had thereby gained a right of occupancy. Sir Barnes Peacock also added an expression of his doubt, whether a right of occupancy actually gained under section 6 was necessarily heritable. This doubt, as we know, has not been shared by later Judges. In the second case, *Narendra Narayan* v. *Ishan Chandra* (2), the suit was instituted by a purchaser of a zemindari at a sale for arrears of Government revenue. The purchaser

(1) (1867) 7 W. R. 528; B. L. R. F. B. 725.
(2) (1874) 13 B. L. R. 274 (F. B.); 22 W. R. 22.
(3) (1864) 1 W. R. 86.

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sought to eject the defendant who claimed to be a transferee of an occupancy holding. The question arose, whether the defendant had a protected interest as a "raiyat having a right of occupancy" within the meaning of the proviso to section 37 of Act XI of 1859. His purchase of the occupancy holding on the 5th December, 1859, had been recognised by the then zemindar who had accepted him as his tenant. On behalf of the plaintiff, who had purchased the zemindari on the 6th May, 1871, it was argued that as the defendant had not himself been in occupation for twelve years from the 5th December, 1859 to the 6th May, 1871, he had not acquired the status of an occupancy raiyat under section 6 of Act X of 1859. The question thus arose, whether the possession of the transferee could be added to the possession of the transferor who at the date of the transfer had acquired a right of occupancy. Sir Richard Couch, C. J., held that the answer to the question depended *solely* on the terms of section 6 of Act VIII of 1869 B. C., which had replaced section 6 of Act X of 1859. On the construction of that section, it was ruled that the right of occupancy can be enjoyed only by the person who holds or cultivates and pays rent and has done so for a period of twelve years; in other words, the section secures to a raiyat who has cultivated or held for twelve years, a continuance of his cultivation or holding so long as he pays the rent. In support of this construction, reliance was placed upon the proviso at the end of the section by which the holding of the person from whom the raiyat inherits is deemed the holding of the raiyat, indicating that except in that particular case, the holding must be entirely by the person who claims the right. We are not unmindful that there are expressions in the judgment of Sir Richard Couch, C. J, to the effect that a raiyat having a right of occupancy has a "right not being one which can be transferred to some other person," "a right to be enjoyed only by the person who holds or cultivates and pays the rent and has done so for a period of twelve years," and not "a right which he might, having acquired it, transfer or make use of as a subject of property." But the generality of these expressions would be misleading, if we overlooked that they were used in a case where the question of transferability was raised by the zemindar. This circumstance, indeed, is emphasised by Sir Richard Couch when he speaks of the Bengal Rent Act as "a law which imposes a restriction upon the proprietary right of the zemindar or landlord" and adds that "a ryot cannot claim under it, (that is, claim against his landlord) anything more than the words clearly give to him; there are not here, in my opinion, words of so

doubtful a meaning that we should consider whether it would be just or equitable that the ryot should have the power to transfer." Similar observations apply to the judgment of Mr. Justice Phear who thought that the right of occupancy was rather of the nature of a personal privilege than a substantive proprietary right; but this statement must be taken with what immediately follows :—

"I think that there can be no right of occupancy under the terms of this section other than in a person who is cultivating or holding the land as a raiyat in the situation which is mentioned in this section; and that therefore a person can only have this right who is actually cultivating or holding the land, and then only if he has cultivated or held the land as a raiyat for a period of twelve years, according to the rule for estimating that time which is prescribed in the section; and that rule is that only the actual cultivation or holding of the person who sets up the right, and in the case where he has taken the cultivation or the holding of the land by inheritance from a predecessor, then, constructively, the cultivating or holding of that predecessor counts. The section does not give to any one other than the person who has actually held or cultivated land for the period of twelve years either by himself alone, or by himself and his predecessor from whom he has taken by inheritance, together, the right of occupation which is the subject of the section. And if this be so, then it seems to be plain upon the facts which the reference brings before us that Ishan Chandra Sen, the defendant in the case, has not a right of occupancy in the land which is the subject of suit, because he has himself only cultivated or held it as a raiyat for a period of a little more than eleven years, and the person who preceded him in the cultivation or holding thereof was not one from whom he took it by inheritance. His predecessor in the cultivation or holding was Krishna Das, from whom he took by purchase. In that state of things he is not entitled by the words of section 6 to add any years of Krishna Das's holding to the years of his own holding."*

The scope of this decision and of the grounds therefor, as we shall see later, has been sometimes misunderstood. This has been due perhaps in some measure to the very broad general statement which forms the headnote to the report in the Weekly Reporter: "A right of occupancy which a raiyat has under Act VIII B. C. of 1869 section 6 is not transferable. When such raiyat sells his holding, his right of occupancy ceases, and it cannot protect the purchaser against ejectment." It is not necessary for us to examine

* 13 B. L. R. 274 (290-291)—Rep.

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in detail the earlier decisions which are mentioned in the order of reference to the Full Bench by Markby and Birch, JJ. But reference must be made to the judgment of Mr. Justice Phear in *Bibee Sukedra* v. *Maxwell Smith* (1), where a comparison is instituted between a right of occupancy and a profit *a prendre*, and the raiyat's interest is described as the dominant right and the zemindar's the servient right. Analogies of this description are not likely to be of much assistance in the solution of a problem which by itself is not wholly free from complexity and confusion. Upon an examination of the facts of all the decisions on the question of transferability of occupancy holdings which preceded the decision of the Full Bench and which have been brought to our notice, we find that the validity of the transfer has been challenged only by the zemindar or by a person claiming through or under him; and this important circumstance must be carefully borne in mind when we meet with general expressions like "a right of occupancy cannot be transferred" in cases between landlords and tenants; as an instance, we may mention the judgment of the Judicial Committee delivered by Sir Richard Couch in the case of *Chandrabati* v. *Harrington* (2); see also the judgment of Phear, J., in *Bootee* v. *Moorut* (3). Our attention has not been drawn to a single instance where, under Act X of 1859 or Act VIII of 1869, B. C., the contention was advanced on behalf of the raiyat that his holding was not transferable even with the assent of the landlord. What was understood to be the law in this respect as administered by the Sudder Dewany Adawlut before Act X of 1859 was apparently also taken to be the law under Act X of 1859 and under Act VIII of 1869 B. C. This is shown by the following extract from the judgment of Prinsep and Ghose, JJ., in *Palakdhari Rai* v. *Manners* (4), delivered on the 3rd September, 1895:

"It is useful that we should state shortly the law relating to the transfer of rights of occupancy. These rights were first expressly declared by Act X of 1859, for, although up to that time tenant right had no doubt been recognised by the Courts, still it was not clearly defined or indeed held to exist in the terms expressed by Act X of 1859. The only person concerned in the transfer of a tenant's holding was naturally the landlord-zemindar, and if his consent had been obtained, or if he acquiesced in the transfer, the transaction came into effect. But his consent was often withheld or not

(1) (1873) 20 W. R. 139.
(2) (1890) I. L. R. 18 Calc. 349 (353); L. R. 18 I. A. 27.
(3) (1873) 20 W. R. 478.
(4) (1895) I. L. R. 23 Calc. 179 (181).

even asked for, and the Courts were soon called upon to determine the validity of such transfers. As a rule, the consent of the landlord was necessary. It was even doubted, see per Peacock, C. J., in *Ajoodhia Persad* v. *Emambandi Begum* (1), where a holding with rights of occupancy was heritable. But it was afterwards held that the consent of the landlord was not necessary to render a transfer valid if it was in accordance with a custom of the country or the locality. It will be observed, however, that in none of the cases on this subject was any reference made to a transfer in accordance with usage. The Courts held that the custom of the country or the locality alone conferred the right of transfer of such holdings without the consent of the landlord. Sales of such holdings in execution of decrees against such tenants used occasionally to be held. When they were held at the instance of the landlord as decree-holder, the transfer so effected would be with his consent; but when the sales were in execution of decrees by third parties the right of transfer without such consent was generally disputed. Bengal Act VIII of 1869, which repealed Act X of 1859 wherever it was brought into operation, did not alter the law in this respect, except in so far that section 6 seemed to recognise a transfer by inheritance of a holding with right of occupancy, and so the law remained until the passing of the Bengal Tenancy Act in 1885."

Such then was understood to be the law before the Bengal Tenancy Act came into operation, and for nearly a dozen years, no one appears to have doubted that in the event of a transfer, voluntary or involuntary, of an occupancy holding not transferable by custom or local usage, the landlord was the only person entitled to dispute the validity of the transfer, if it had been effected without his consent previously taken or assent subsequently obtained. In the case of *Bhiram Ali* v. *Gopi Kanth* (2), which was decided on the 14th January, 1897, it was however contended by an occupancy raiyat whose holding had been sold in execution of a decree for money, that the sale was invalid and had not operated to pass any title to the purchaser at the execution sale. This contention prevailed and the proposition was enunciated for the first time, that, in the absence of custom or local usage to the contrary, a raiyati holding in which the raiyat has only a right of occupancy is not saleable at the instance of the occupancy raiyat or any creditor of his, other than his landlord seeking to obtain satisfaction of his decree for arrears of rent. The Court came to the conclusion that

(1) (1867) B. L. R. F. B. 725; 7 W. R. 528.
(2) (1897) I. L. R. 24 Calc. 355.

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ordinarily the only persons interested in impugning the validity of the transfer of an occupancy holding were the occupancy raiyat and the landlord, and that though no difficulty could arise in the way of the transfer being given effect to, where, in the event of a voluntary alienation by the raiyat, the transferee was accepted by the landlord, the position was wholly different where the transfer had been effected by a compulsory sale at the instance of a creditor of the raiyat. This view was supported on three grounds, namely, first, that section 26 of the Bengal Tenancy Act by implication indicates that the legislature did not intend to make occupancy rights transferable; secondly, that section 65, also by implication, indicates that an occupancy holding could be sold, only by the entire body of landlords in execution of a decree for arrears of rent; and, thirdly, that under the law as it stood before the Bengal Tenancy Act, a right of occupancy could not be transferred by sale. With all respect for the learned Judges who decided the case of *Bhiram Ali* v. *Gopi Kanth* (1), we are constrained to hold that none of these grounds is conclusive. In the first place, the Bengal Tenancy Act, as its preamble shows, is intended to amend and consolidate, not the entire law of landlord and tenant but only certain enactments relating to that law, so that, as pointed out in *Kripa Sindhu* v. *Annada* (2), it is not a complete Code. It nowhere purports to give an exhaustive enumeration of all the incidents of occupancy right. The fact that section 26 makes occupancy right heritable and does not refer to the question of transferability does not consequently justify the inference that the legislature did not intend to make occupancy rights transferable. If speculation were permissible, it might, with some plausibility, be suggested that the legislature expressly dealt with the question of heritability, as a doubt had been expressed on the point by Sir Barnes Peacock, C. J., in *Ajoodhya Pershad* v. *Imam Bandi* (3), and did not think it equally necessary to deal with the question of transferability, as the rulings of the Sudder Dewani Adawlat in 1834 and 1855 had apparently never been called in question. On the other hand, it might also be suggested with equal, if not greater, plausibility that the legislature dealt with the simpler question of heritability and left alone the more complex problem of transferability. But whatever may be the true reason for the omission, the mere fact of the omission does not with certainty point to the conclusion that the legislature intended to make occu-

(1) (1897) I. L. R. 24 Calc. 355.
(2) (1907) I. L. R. 35 Calc. 34 (F. B); 6 C. L. J. 273 (F. B).
(3) (1867) 7 W. R. 528.

pancy holdings non-transferable. In the second place, section 65 of the Bengal Tenancy Act is of no real assistance in the solution of the question before us. Section 65 enacts that where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates, or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sell in execution of a decree for the rent thereof and the rent shall be a first charge thereon. The object of this provision was, not to impose a restriction on a sale of the holding by the raiyat or at the instance of his execution creditor, but to remove what had been a great hardship on the raiyat for nearly a century. The framers of Regulation 7 of 1799, in their anxiety to strengthen the hands of the zemindar, had armed him with authority to realise arrears of rent from tenants by drastic measures which have been deemed characteristic of a semi-civilised age. Amongst these remedies were distraint, arrest and forfeiture, powers which could all be exercised in a summary manner. The result was that a valuable holding could be treated as forfeited and the tenant summarily ejected for non-payment, it may be, of a small sum due as arrears of rent. The severity of such methods as these was softened by some of the provisions of Act X of 1859; but it was not till 1885, that the Bengal Tenancy Act provided that an occupancy raiyat was not liable to be ejected for non-payment of rent. The landlord could bring the holding to sale, with the result that he would thereby realise the arrears from the sale proceeds, while the surplus would be available to the defaulter. Section 65 consequently does not justify the conclusion that an occupancy holding is saleable, only when the landlord seeks to sell it in execution of a decree for arrears of rent thereof. On the other hand, section 65 makes the rent a first charge on the occupancy holding; for this purpose, it is placed in the same category as a permanent tenure and the holding of a raiyat at fixed rates which, under section 18 is governed by the same rules of transfer and succession as a permanent tenure. This plainly militates against the theory that an occupancy right is a purely "personal right" or "personal privilege." In the third place, the statement of the law as it stood before the Bengal Tenancy Act is open to valid criticism. The inference drawn from the decision of the Full Bench in *Narendra Narayan* v. *Ishan Chandra* (1), is really not justified, as we have seen, by the circumstances of that case. That case arose between a zemindar and a person who claimed protection from ejectment as the holder of an occupancy right; besides, as Sir Richard Couch C. J., stated expli-

(1) (1874) 13 B. L. R. 374; 22 W. R. 22.

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citly in his judgment, and explained again in *Kripa Nath* v. *Dyal Chand* (1) the case depended solely on the construction of section 6 of Bengal Act VIII of 1869. The difficulty created by the phraseology of that section, as will presently appear, has been removed by the altered provisions of the Bengal Tenancy Act. On the other hand, the attention of the learned Judges does not appear to have been drawn to the rule enunciated by the Sudder Dewani Adawlat in 1834 with regard to involuntary transfers and in 1855 with regard to voluntary alienations—rules which do not appear to have been ever afterwards called in question. Consequently, there is no escape from the conclusion that the grounds of the decision in *Bhiram Ali* v. *Gopi Kanth* (2), which was in reality a departure from the law as administered for over sixty years, do not stand the test of criticism.

In this connection, it is of fundamental importance to observe that the Bengal Tenancy Act went much further than Act X of 1859 in the way of improvement of the status of the occupancy raiyat, and the phraseology used in some of its provisions can hardly be reconciled with the theory that a right of occupancy is a purely personal right. But before we deal with this point, we may explain how the Bengal Tenancy Act has removed the difficulty created by the language of section 6 of Act X of 1859 by the introduction of the notion of "a settled raiyat of a village." The status of a settled raiyat is thus defined in section 20 :

"(1) Every person who, for a period of twelve years, whether wholly or partly before or after the commencement of this Act, has continuously held, as a raiyat, land situate in any village, whether under a lease or otherwise shall be deemed to have become on the expiration of that period, a settled raiyat of that village.

(2) A person shall be deemed, for the purposes of this section, to have continuously held land in a village, notwithstanding that the particular land held by him has been different at different times.

(3) A person shall be deemed, for the purposes of this section, to have held as a raiyat any land held as a raiyat by a person whose heir he is.

(4) Land held by two or more co-sharers as a raiyati holding shall be deemed, for the purposes of this section, to have been held as a raiyat by each such co-sharer.

(5) A person shall continue to be a settled raiyat of a village as long as he holds any land as a raiyat in that village and for one year thereafter.

(1) (1874) 22 W. R. 169.

(2) (1897) I. L. R. 24 Calc. 355.

(6) If a raiyat recovers possession of land under section 87, he shall be deemed to have continued to be a settled raiyat, notwithstanding his having been out of possession more than a year.

(7) If, in any proceeding under this Act, it is proved or admitted that a person holds any land as a raiyat, it shall, as between him and the landlord under whom he holds the land, be presumed, for the purposes of this section, until the contrary is proved or admitted, that he has for twelve years continuously held that land or some part of it as a raiyat."

Section 21, Sub-section 1 then provides that every person who is a settled raiyat of a village within the meaning of section 20 shall have a right of occupancy in all land for the time being held by him as a raiyat in that village. Consequently, a settled raiyat may acquire a right of occupancy by occupation for a shorter period than twelve years, and, further, though every settled raiyat is an occupancy raiyat, every occupany raiyat is not necessarily a settled raiyat; for, as was pointed out in *Kuldip* v. *Okhatur* (1), an occupancy right may be acquired by purchase, but the rights of a settled raiyat can only be acquired by a continuous holding of land (not necessarily the same parcel of land) in the village for twelve years. It is manifest that the difficulty which was created by the language of section 6 of Act X of 1859 need not arise under the provisions of the Bengal Tenancy Act.

Section 23 of the Bengal Tenancy Act, authorises an occupancy raiyat to use his land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy: the section further entitles him to cut down trees, provided there is no local custom to the contrary. Sections 24 and 27 read together place the occupancy raiyat in a position of distinct advantage so far as enhancement of rent is concerned; he is bound to pay rent only at fair and equitable rates, and, until the contrary is proved by the landlord the rent actually paid must be deemed fair and equitable. section 28 makes the rent enhanceable only as provided in the Act; section 29 invalidates agreements for enhancement beyond a prescribed limit, while sections 30 to 37 provide definite rules and restrictions when enhancement is claimed by suit. Section 25 affords protection from eviction, and this must be taken with section 89 which prohibits ejectment except in execution of decree and section 155 which affords relief against forfeitures. Section 26 deals with the question of devolution of occupancy right on the death of the raiyat and provides as follows:

(1) (1898) 3 C. L. J. 285.

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"If a raiyat dies intestate in respect of a right of occupancy, it shall, subject to any custom to the contrary, descend in the same manner as *other* immovable property; provided that in any case in which under the law of inheritance to which the raiyat is subject, his other property goes to the Crown, his right of occupancy shall be extinguished".

The right of occupancy, it will be observed, is for purpose of descent, thus placed on the same footing as "*other* immoveable property." This is hardly consistent with the theory that the right of occupancy is a merely personal right. This is further emphasised by the fact that the right of escheat is expressly negatived. Section 85 authorises sub-letting subject to specified restrictions, and section 87 allows the raiyat to surrender his holding. Sections 76 and 77 entitle the raiyat to effect substantial improvements including the construction of wells and tanks and the erection of a suitable dwelling-house for himself and his family. Section 65, as already explained, protects the occupancy raiyat from ejectment for non-payment of rent, makes the rent a first charge on the holding and entitles the landlord to bring it to sale in execution of a decree for arrears of rent thereof. Section 160 treats a right of occupancy as a protected interest, not liable to be annulled by a purchaser of the superior tenure at a sale in execution of a decree for arrears of rent. The cumulative effect of these and other provisions which need not be enumerated in detail is to furnish abundant indication that whatever might have been the law earlier, the occupancy raiyat enjoys under the Bengal Tenancy Act substantial rights in the land and his interest cannot be appropriately described as a merely "personal right" or "personal privilege." The position then is that the status of the occupancy raiyat is far more certain and secure under the Bengal Tenancy Act than it was ever before, and there is no good reason to hold that the provisions of the Act entitle him to object to the sale of the holding in execution at the instance of his creditor, if he was not competent to raise such objection when Act X of 1859 was in force or at an earlier period. Reference may in this connection be made to illustration (1) to section 183, which mentions a usage whereby a raiyat is entitled to sell his holding without the consent of his landlord and affirms the validity of such usage as unaffected by the Act. This, no doubt, does not directly show that the landlord is the only person interested to question the validity of a transfer of his holding by a raiyat; but it does not also lend any support to the theory that the tenant is competent to object to an execution sale of his holding even though his landlord should

assent thereto. On these grounds, we are of opinion that the decision in *Bhiram Ali* v. *Gopi Kanth* (1) cannot be supported.

In this view, it is not necessary to examine in detail the subsequent decisions of this Court which have followed and developed in a modified form the rule enunciated in *Bhiram Ali* v. *Gopi Kanth* (1) such as the cases of *Durga Charan* v. *Kali Prasanna* (2); *Sadagar Sircar* v. *Krishna Chandra* (3); *Majed Hossein* v. *Raghubur* (4); *Gahar Khalipa* v. *Kasi Muddi* (5); *Sita Nath* v. *Atmaram* (6): *Murullah* v. *Burullah* (7); and *Khoda Bux* v. *Sadhu Pramanick* (8) which specified the circumstances under which the raiyat could impeach the validity of an execution sale even after it has taken place. We may note, however, that the current did not always flow in the same direction, as is indicated by the cases of *Ananda Das* v. *Ratnakar* (9); *Shakaruddin* v. *Hemangini* (10), and possibly also *Dwarkanath* v. *Tarini Sankar* (11). These cases uphold the doctrine that in principle there is no difference between the case of a voluntary sale made by the raiyat and an involuntary sale held by the Court, if in each instance the sale is consented to by the landlord; consequently, a sale, in execution of a money decree, of an occupancy holding not transferable by custom or local usage, is valid and effectual as against the raiyat if the sale is held with the consent of the landlord.

We have finally to consider the decision of the Full Bench in *Dayamayi* v. *Ananda Mohan* (12). It is not necessary to examine whether the Full Bench formulated any propositions not required for the decision of the actual questions involved in the cases then before the Court. An investigation of that point might have been necessary, if we had been bound by the decision of the Full Bench. We observe that the question of involuntary alienation was raised by the third reference; the point, however, is immaterial, because we as a Special Bench are free to consider the decision on its merits, and we shall do so on the assumption that all the propositions formulated were needed for the decision of the case before the Full Bench. It will be observed that no reasons are assigned in support of the decision and the propositions enunciated represent the weight of modern authority alone. There is no indi-

(1) (1897) I. L. R. 24 Calc. 325.
(2) (1899) I. L. R. 26 Calc. 727.
(3) (1899) I. L. R. 26 Calc. 937.
(4) (1899) I. L. R. 27 Calc. 187.
(5) (1899) I. L. R. 27 Calc. 415.
(6) (1900) 4 C. W. N. 571.
(7) (1905) 9 C. W. N. 972.
(8) (1910) 14 C. L. J. 620.
(9) 1903) 7 C. W. N. 572.
(10) (1911) 16 C. W. N. 420.
(11) (1907) I. L. R. 34 Calc. 199; 5 C. L. J. 294; 11 C. W. N. 513.
(12) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.

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cation that the attention of the Court was invited to the law, as it was understood and administered from the days of the Sudder Dewani Adawlat. No reference was made to the Construction of 1834, and although the decision in *Prosonokoomar* v. *Rammohun* (1), was casually mentioned in argument, its true bearing does not appear to have been explained to the Court. Nor was the attention of the Court invited to the decision in *Dwarka Nath* v. *Hurrish Chunder* (2) which affirms that there is, in principle, no ground for distinguishing in this class of cases a voluntary sale from a sale in execution. It seems as if the decision in *Bhiram Ali* v. *Gopi Kanth* (3) was not subjected to a searching analysis and was adopted by the Full Bench without question. In these circumstances, we are unable to accept the decision of the Full Bench in *Dayamayi* v. *Ananda Mohan* (4), in so far as it adopted the rule laid down in *Bhiram Ali* v. *Gopi Kanth* (3), as developed with modifications in the later cases just mentioned. No useful purpose would be served by an examination of the cases subsequent to the decision of the Full Bench, which have, as required by the rules of Court, applied the propositions enunciated therein. Amongst such cases may be mentioned *Badarennessa* v. *Alam Gasi* (5); *Narayani* v. *Nabin Chandra* (6); *Ramsundar* v. *Lochan* (7); *Swarnamoyi* v. *Adu* (8); *Bipin Chandra* v. *Jagat Chandra* (9). These cases are based on the decision of the Full Bench and must stand or fall with it. Nor did we examine the position when an occupancy raiyat effects a voluntary transfer of his holding for value by way of sale or mortgage, as in *Bhagirath* v. *Hafisuddin* (10); *Ram Pershad* v. *Jawahir* (11); *Syama Charan* v. *Mokshoda* (12), or makes a gift as in *Behari Lal* v. *Sindhubala* (13), or makes a testamentary devise thereof, as in *Amulya Ratan* v. *Tarini* (14); *Kunja Lal* v. *Umesh Chandra* (15) and *Umesh Chandra* v. *Joynath* (16). The decisions in cases of voluntary transfer for value were based on the application of what is described sometimes as the principle of estoppel, sometimes as the principle that the transferor

(1) (1855) Beng. S. D. 14.
(2) 1879) I. L. R. 4 Calc. 925; 4 C. L. R. 130.
(3) (1897) I. L. R. 24 Calc. 355.
(4) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.
(5) (1915) 21 C. L. J. 650; 19 C. W. N. 814.
(6) (1916) 25 C. L. J. 331; 21 C. W. N. 400; I. L. R. 44 Calc. 720.
(7) (1916) 38 I. C. 942. (8) (1916) 39 I. C. 119.
(9) (1919) 51 I. C. 962. (10) (1900) 4 C. W. N. 679.
(11) (1907) 7 C. L. J. 72 (73). (12) (1911) 13 C. L. J. 481.
(13) (1917) 27 C. L. J. 497; 22 C. W. N. 210.
(14) (1914) I. L. R. 42 Calc. 254; 21 C. L. J. 187; 18 C. W. N. 1290.
(15) (1914) 18 C. W. N. 1294. (16) (1917) 22 C. W. N. 474.

is bound by his act or cannot derogate from his grant. On the other hand, the decisions in cases of involuntary sales, where the raiyat with knowledge omitted or failed to object to the transfer, were based on the principle of acquiescence or waiver. There were manifest difficulties in the application of all such doctrines, because if the right of occupancy was a purely "personal right" or "personal privilege," it is not easy to appreciate how it could in fact be made transferable by invoking the aid of one or other of these principles of law; the transferee, even if accepted by the landlord, might only have a new tenancy as suggested in *Tara Pershad* v *Soorjo Kant* (1). Assuming, however, that it might thus acquire a character of transferability as between transferor and transferee, it would not afford protection as against third parties; yet, barring possibly two cases, *Agarjan* v. *Panaulla* (2), and *Basarat* v. *Sabulla* (3) no trace can be found of a reported decision where the title of the transferee of a non-transferable occupancy holding has been successfully impeached by an absolute trespasser. But we need not investigate further the validity of the reasons which underlie the various reported cases. We are concerned in the present instance with the question of involuntary alienation alone; that, in our opinion, stands on the same footing as the question of voluntary alienation, the rule as regards which is too firmly settled to be successfully challenged.

Our conclusion is that the case of *Bhiram Ali* v. *Gopi Kanth* (4), was erroneously decided and that the decision of the Full Bench in *Dayamayi* v. *Ananda Mohan* (5) cannot be supported in so far as it affirmed the rule enunciated therein as modified and developed in later cases. The confusion which has pervaded the discussion of this question is attributable in a large measure to the ambiguity involved in the statement that "an occupancy holding is not transferable except by custom or local usage." This may imply one of three alternatives. In the first place, it may be maintained that an occupancy holding is absolutely inalienable by its nature. This view might possibly have been maintained towards the close of the eighteenth century, but has apparently few, if any, champions at the present day. In the second place, the expression may signify that an occupancy right cannot be transferred unless both the landlord and the tenant consent. This was the view put forward for the first time

(1) (1871) 15 W. R. 152.
(2) (1910) I. L. R. 37 Calc. 687; 12 C. L. J. 169; 14 C. W. N. 779.
(3) (1898) 2 C. W. N. CCLXXIX.
(4) (1897) I. L. R. 24 Calc. 355.
(5) (1914) I. L. R. 42 Calc. 172; 20 C. L. J. 52.

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in 1897 and has held the field up to the present time. There is however nothing to indicate that the legislature ever intended to impose a disability on the occupancy raiyat with a view to protect the helpless cultivator from rapacious money-lenders, as appears to have been the policy which actuated the framers of the Punjab Land Alienation Act, 1900. In the third place, the expression may signify that the transfer of an occupancy holding, whether voluntary or involuntary, cannot be made effective except with the consent of the landlord. This was the view maintained from 1834 to 1897. For reasons already assigned, we hold that the third view is correct, and was, through oversight or error, negatived in 1897.

The result of our decision may be briefly summed up :

(1) The case of *Bhiram Ali* v. *Gopi Kanth* (1) was erroneously decided ;

(2) The decision of the Full Bench in *Dayamayi* v. *Ananda Mohan* (2) requires partial modification, namely, the following should be substituted for the first proposition enunciated therein regarding the transfer for value of occupancy holdings apart from custom or local usage :—

"I. The transfer of the whole or a part is operative as against the raiyat, whether it is made voluntarily or involuntarily."

When voluntary and involuntary transfers are thus placed in the same category so far as the raiyat is concerned, no difficulty can arise under section 60 of the Civil Procedure Code, which makes saleable in execution all property belonging to the judgment-debtor over which he has a disposing power, thus prescribing precisely the same test as was formulated by Mr. Justice Jackson in *Dwarka Nath* v. *Hurrish Chunder* (3) namely, that the measure of the liability to involuntary alienation is the power of voluntary alienation.

We have been finally pressed on behalf of the judgment-debtor to adhere to the rule enunciated in *Bhiram Ali* v. *Gopi Kanth* (1), even though we should hold it erroneous in principle, as it was decided more than twenty years ago. Reliance has been placed in support of this contention upon the decisions of the House of Lords in *Mediana* v. *Comet* (4), and *Kruglinger* v. *New Patagonia Meat* Co. (5). We are sensible of the importance of maintaining, whereever possible, the authority of long established decided cases ; but this doctrine is manifestly not of universal application, Lord Cranworth observed as follows in *Young* v. *Robertson* (6) :

(1) (1897) I. L. R. 24 Calc. 355.
(2) (1914) I. L. R. 42 Calc. 172 ; 20 C. L. J. 52.
(3) (1879) I. L. R. 4 Calc. 925.
(4) (1900) App. Cas. 113.
(5) (1914) App. Cas. 25.
(6) (1862) 4 Macque H. L. C. 314 (345).

"There is another duty incumbent on all Courts, and pre-eminently upon a Court of ultimate appeal, and which has been invariably observed, namely, that as regards those rules which regulate the settlement and devolution of property, those Courts which have to interpret instruments and acts of parties must take care to be very guarded against letting any supposed notions as to the inaccuracy of any rule which has in fact been acted upon, induce them to alter it so as to endanger the security of property and titles."

Lord Chelmsford considered the matter from the point of views of the duty of a Court of ultimate appeal when he observed as follows in *Mersey Docks* v. *Cameron* (1). "The Courts rightly abstain from overruling cases which have been long established, because if they did so, they would only disturb, without finally settling the law. But when an appeal from any of their judgments is made to this House, however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of *stare decisis*, refuse to examine the foundation upon which they rest."

Equally explicit is the pronouncement of Lord Loreburn in *Westham Union* v. *Edmonton Union* (2). "Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and specially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of thi House (of Lords) to overrule them, if it has not lost the right to do so by itself expressly affirming them."

The same principle has been followed in this Court and cases are not wholly unknown where Full Bench decisions have been overruled by Special Benches; see, for an instance, *Jogodanund* v. *Amrita Lal* (3) which overruled the three Full Bench cases; *Lal Mohun* v. *Jogendra* (4); *Unir Ali* v. *Ram Komal* (5); and *Girish Chundra* v. *Apurba Krishna* (6). The Judicial Committee have also not hesitated to overrule long standing decisions of Indian High Courts; *Balusu* v. *Balusu* (7) *Vasudeva* v. *Srinivasa* (8).

(1) (1864) 11 H. L. C. 443 (510). (2) (1908) App. Cas. 1 (4).
(3) (1895) I. L. R. 22 Calc. 767.
(4) (1887) I. L. R. 14 Calc. 636. (5) (1888) I. L. R. 15 Calc. 383.
(6) (1894) I. L. R. 21 Calc. 940.
(7) (1898-99) I. L. R. 22 Mad. 398; L. R. 26 I. A. 113.
(8) (1907) I. L. R. 30 Mad. 426.

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Mookerjee, A. C. J.

In the present case, there are moreover three special features which cannot be entirely overlooked. In the first place, the decision in *Bhiram Ali* v. *Gopi Kanth* (1) departed from what had been the law for over sixty years. In the second place, the current of decisions since then has not been absolutely uniform. In the third place, we are called upon only to remove what has hitherto been erroneously regarded as a fetter upon the right of an execution creditor to realise his dues by the sale of an occupancy holding. The case therefore falls within the principle recognised by the Court of Appeal in *Andrews* v. *Gas Meter Co* (2) by the Judicial Committee in *Balusu* v. *Balusu* (3) and by the House of Lords in *Westham Union* v. *Edmonton Union* (4). Our decision will not embarrass trade or commerce, nor will it affect transactions which may have been adjusted, rights which may have been determined, titles which may have been obtained or personal status which may have been acquired. Decree-holders will find that they possess a power which has hitherto been denied to them. No doubt, judgment-debtors like the respondent before us (who, as was found by the trial Court, can easily pay up the decree if he will, but is unwilling to pay it up) will no longer be able to escape payment of their just liabilities. That surely is a result which need not make us hesitate to lay down the law correctly.

We hold accordingly that the question before the Special Bench should be answered in the affirmative and that the sole landlord of a raiyat is competent to sell in execution of a money decree against the raiyat his occupancy holding, whether the holding be or be not transferable by custom or local usage. The appeal must accordingly be decreed and the application for execution allowed with costs in all the Courts, including costs of the hearing before the Division Bench and the Special Bench. The hearing fee is assessed at three gold mohurs on each occasion.

Fletcher, J.—I agree.

Chatterjea, J.—I agree.

Teunon, J—I agree.

Richardson, J.—I agree.

Chaudhuri, J.—I agree.

Shamsul-Huda, J.—I agree.

A. T. M. *Appeal allowed.*

(1) (1897) I. L. R. 24 Calc. 355.
(2) (1897) 1 Ch. 361 (371).
(3) (1898-99) I. L. R. 22 Mad. 98 (430).
(4) (1908) App. Cas. 1.

[*Reporter's note*—(1) The following is an exact translation of the petition on which the Sudder Dewani Adalat made the order recorded in construction No. 890.

Sd. Nub Kanto
By the pen of Radha Benode,
Pleader of the Court.

PETITION.

No. 1386.

1230 Mis: Seal of the Dewany Adalat. Dist. Jessore. 1200.

Hail Cherisher of the poor,

The petition of your petitioner Nub Kanto Roy, inhabitant of Nowpara, Pergana, Yusuffpore is as follows:

Your petitioner took out execution of a decree passed by your honour with costs for Rs. (torn) hundred and thirty two annas four on account of a debt which was due, against Kashi Nath Ghose of Korigram, Ramdhun Surma and others, in No. 1068 of this Court; and upon issue of notices and body warrants the defendants disappeared. In Mouza Tapanga (?) Amla Taraf Mawal, Pergana Naldi there is a jote jama paying a rental of Rs. 97-6-0, which is recorded in the name of (torn) Nath Ghose in the Sherishta of Pares Nath Ray, minor Zemindar, and Bani Kanta Rai, the Sudder Ijaradar under the Court of Wards. Without the said Jama being sold by auction it is impossible to realise the decretal money due to your petitioner. In this circumstance, if an order be passed for attachment and sale of the said jama your petitioner's decretal money may undoubtedly be realised. Your petitioner therefore prays that your honour will be graciously pleased to pass an order directing the defendants' said jama to be sold by auction, in due form and the said amount to be awarded with costs and interest upto the day of payment.

Dated the 18 (?) Jet 1241 B. S.

Upon perusal it is ordered that the petition of the petitioner be put up along with the record (of the case) on Friday before this Court. Dated the 31st May, 1834 corresponding to the 20th Jet, 1241 B. S.

(2) Amongst others, the following cases are over-ruled; *Jasip v. Ram Kumar* (1899) 3 C. W. N. 747; *Durga v. Kali* (1899) I. L.

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R. 26 Calc. 727; *Majid* v. *Raghubur* (1899) I. L. R. 27 Calc. 187; *Gahar* v. *Kasi Muddi* (1899) I. L. R. 27 Calc. 415: *Sadagar* v. *Krishna* (1899) I. L. R. 26 Calc. 937; *Sita Nath* v. *Atmaram* (1900) 4 C. W. N. 571 *Murullah* v. *Burullah* (1905) 9 C. W. N. 972; *Peary Mohan* v. *Jote Kumar* (1906) 11 C. W. N. 83; *Agarjan* v. *Panaullah* (1910) I. L.R. 37 Calc. 687; 12 C. L. J. 169; *Khodabux* v. *Sadar* (1910) 10 I. C. 417; *Mur Mia* v. *Chandra* (1913) 23 I. C. 939; *Rufjan* v. *Satya* (1915) 19 C. W. N. cxvi; *Lala Deosaran Lal* v. *Bateswar* (1916) 23 C. L. J. 559; *Naravani* v. *Nabin* (1916) 25 C. L. J. 351; *Badaranissa* v. *Alam* (1915) 21 C. L. J. 650: *Ramsunder* v. *Lochan* (1916) 38 I. C. 942; *Swarnamoyi* v. *Adu* (1916) 39 I. C. 119; *Bepin* v. *Jugot* (1919) 23 C. W. N. lxxxiv.].

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An appeal presented to the Court, was found to be out of time. The appellant filed an affidavit explaining the circumstances. Upon that the then District Judge ordered the appeal to be admitted "subject to objection at the hearing." The appeal was heard at length on the merits by the successor of the District Judge, the respondents raising no objection as to limitation. The District Judge held in favour of the appellant on the merits but dismissed the appeal, acting *suo motu* on the ground of limitation :

Held, that the order admitting the appeal was provisional in the sense that the respondents might at the hearing, take exception to it and show that it was wrong. Hence the District Judge was not at liberty to go behind the order, so long as the respondents did not choose to object to it,

That the District Judge should have decided the appeal in accordance with the opinion which he had formed on the merits.

The practice of admitting appeals "subject to objection at the hearing," is condemned : **Telendrajit Raj Kumar v. Gimendrajit Raj Kumar** ... 1

———*Judgment—Order refusing to issue commission to examine witnesses—Letters Patent, cl. (15).*

No appeal lies from an order refusing to issue commission for the examination of witnesses, as the order is not a judgment within the meaning of clause (15) of the Letters Patent. **Toromoni Dibiook Roy v. Kunj Lall Mannekar Dass** 162

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The determination of causes depends on the allegations and the proof.

An appellate Court is not entitled to raise new points involving fresh evidence in appeal and to remand the case for the trial of questions which never occurred to the parties previously. **Basumati Debi v. Taribasani Dasi** 354

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No appeal lies against an order passed by an appellate Court remanding a case otherwise than under order 41 rule 23 of the Code of Civil Procedure. **Mohendra Nath Chakravarti v. Ramtaran Bandopadhya** ... 357

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An appeal lies against an order of remand by an appellate Court under Order 41, rule 23 of the Code of Civil Procedure, although the order ought not to have been made under that rule: **Prasanna Chandra Chattopadhya v. Baidya Nath Mistry** 360

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The Board of Improvement Trust are not required to delineate on the plan the building sites before the scheme is submitted to Government for sanction.

The fact of Board's making enquiries under sub-section 2 of section 78 of the Calcutta Improvement Act, does not disentitle them ultimately to reject the application on the ground that it does not come within sub-section 1 of that section. **Bepin Behary Sen v. The Trustees for the Improvement of Calcutta** 334

Burden of proof—Allegation that disputed lands, at the time of Permanent Settlement, included in permanently settled estates and settled with his predecessor in title; *See* Revenue, settlement of 320

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——— *of proof—Hindu Law—Migration—Law of place—Presumption—Succession and family relation—Mixture of customs and ceremonies.*

A Hindu family residing in a particular province of India is presumed to be governed by the law of the place where it resides: But where a Hindu family is shown to have migrated from one province to another, the presumption is that it carried with it the law and custom as to succession and family relation prevailing in the province from which it came: This presumption, however, is rebuttable by proof that the family has adopted the law and usage of the place to which, it has migrated:

The Brahmans and Kayasthas of Bengal migrated from Kanauj and originally brought with them the Mithila law; it was after their settlement in Bengal, that the Dayabhaga School of Hindu Law was founded by Jimutavahana about the 14th century and that is the law which now governs the Hindu population of that province even though they may have originally migrated from North Behar. Consequently a party asserting migration from Behar, would have to establish, not merely that the family migrated from Behar, but that the migration took place after the foundation of the Bengal school of Hindu Law by the author of the Dayabhaga.

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Burden of proof—(*Contd.*).

The evidence to support a case that a family has conformed to religious or social rites and usages consistent with the Mitakshara law, may strengthen the case of a person alleging migration from Behar : A mixture of customs and ceremonies can be of no assistance to the party seeking to establish the applicability of a personal law not prevalent in the locality : **Pitambar Chandra Saha Chaudhuri v. Nisi Kanta Saha** ... 52

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——— *of proof—Presumption—Uniform payment of rent exceeding 20 years—Bengal Tenancy Act (VIII of 1885), Sec. 50 (2).*

When a tenant proves payment of rent at a uniform rate for a period exceeding 20 years, the presumption is that the tenant holds the land without being liable to have his rent increased unless and until the landlord shows something to the contrary. **Gopal Chandra Banerjee v. Muhammad Solemun Mullick** 11

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Counsel—*Professional work—Litigant, if can instruct counsel—Solicitor—Appeals from mofussil—Professional usage and etiquette—Judge, if can hear a case in which he was Counsel—Judge, if can decide a case, in which he was Counsel for one of the parties in other matters.*

The usage and etiquette of the profession require that in all but some exceptional cases, Counsel should not undertake any professional work as regards which the relation of Counsel and client can arise except on the instructions of a solicitor. There is no statutory rule of law to prevent a litigant from instructing Counsel directly or to prevent Counsel so instructed form appearing on behalf of a litigant; but Judges of the highest eminence have emphasized the importance of strict adherence to the long established usage in this matter. In the Calcutta High Court, departure from this practice has been allowed only in the case of appeals from the mofussil.

There must be a real and not merely a formal compliance with the requirements of professional usage in this respect, which is "expedient in the interest of suitors and for the satisfactory administration of justice." Consequently, communications should pass between Counsel and attorney, and not between Counsel and the lay client without the intervention of the attorney; otherwise, the salutary principle that the attorney stands between the client and his Counsel in all legal proceedings, might in substance be abrogated by means of personal communications between Counsel and client.

The practice which induces Judges voluntarily to decline to hear cases with which they were connected as Counsel before their elevation to the Bench, is but an evolution of the elementary maxim that no man should be a Judge in his own suit and preside in a case in which he is not wholly free, disinterested, impartial and independent. But this principle has no application when objection is taken to Judge trying a cause on the ground that he had, before his appointment, acted as Counsel in other matters for one of the parties.

The fact that a Judge was, prior to his elevation to the Bench, engaged in the particular cause, is no disqualification, though according to custom sanctioned by long usage, a Judge would refuse to adjudicate upon a case if he had been engaged as Counsel therein or in a matter intimately connected therewith.

It is no objection to a Judge trying a case that before his appointment he was Counsel in other matters for one of the parties. **Jacob & Co. v. Rash Behary Ghose** 313

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Creditor, not entitled to interest under the Interest Act, if debarred from claiming interest by way of damages under section 73 of the Contract Act; *See* Interest 348

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Criminal Procedure Code, Sec. 94—Magistrate to consider the necessity of number of books for investigation—Definite instruction as to time and place of inspection; *See* Documents, production of 188

———, Sec. 96—'An enquiry about to be made'—Investigation; *See* Search warrant 267

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———, Sec. 110—Order, nature of—Offence, punishment of; *See* Thieves, gang of, belonging to 192

———, Sec. 118—Evidence to show that the accused had been previously bound down, if admissible; *See* Thieves, gang of, belonging to 192

———, Sec. 133—Some of the jurors present at the time of investigation, effect of—Magistrate, duty of; *See* Jurors, report of ... 371

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Criminal Procedure Code, Sec. 403 Sub-Sec. (2)—Test—Facts same; *See* Rioting 476

——————————— *(Act V of 1898), Sec. 412—Revision—Legality of conviction—Guilty, plea of—Mistake of law—Retrial.*

Per Chaudhuri and Shamsul Huda, JJ.—When a plea of guilty is passed on a mistake of law, it shall not be accepted: It is incumbent on the Magistrate to try the accused on the merits.

Per Newbould, J.: The principle of section 412 of the Code of Criminal Procedure should ordinarily be applied in cases in which the appellate Court is asked to exercise its revisional powers.

Where a person has pleaded guilty and has been convicted on such plea, he waives his right to question the legality of his conviction:

If a plea of guilty should not be recorded, a retrial should be ordered by an appellate Court: **Emperor v. Akab Ali Mazumdar** 122

———————————, Sec. 412, where applicable; *See* Criminal Procedure Code, Sec. 412 122

———————————, Sec. 439—Case outside section 435 of the Code; *See* Letters Patent, clause 36 183

———————————, Sec. 439—High Court, power of—High Court, if can deal with the case of an accused person not appealing against his conviction, in an appeal by another accused—Conviction, if can be set aside; *See* Misdirection 305

———————————, Sec. 439, to be read with and subject to section 435; *See* Letters Patent, clause 36 183

Custom—Burden of proof; *See* Maintenance 91

————, requisites of; *See* Pala, transfer of 37

Damages—Action for trespass—Interference with the exercise of proprietary rights; *See* Suit, maintainability of 495

——— *Assessment of—Contract, breach of.*

The plaintiff was a dealer in flour and other goods at Rungpur and used to get his goods from the defendants' firm at Allahabad. The plaintiff wrote a letter on the 21st July 1914 to the defendants to the following effect: "Within 5 or 7 days in July I shall send an order for one wagon of goods. Please write *swada* (contract) in respect thereof." It was further stated that the plaintiff would send for 2 wagons for delivery in August, 2 wagons in September, 2 wagons in October and 2 in November and that these wagons would be sent for (one at a time) at an interval of 15 days. The plaintiff asked the defendants to quote rates. On the 24th July, the defendants sent a reply quoting the rates from July to November. On the 24th July the plaintiff sent a telegram ordering delivery of one wagon of goods on a former contract and that was despatched by the defendants. On the 26th July 1914, the plaintiff wrote as follows: "The goods ordered for might have been sent by you. Please write *swada* for one wagon for the month of July in respect of flour etc." Then followed the rates of the goods as quoted in the defendants' letter

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Damages—(*Contd.*).

dated the 24th July. The letter then proceeded as follows: "Please write *swoda* for 4 wagons in respect thereof. On arrival of the goods ordered, I shall send for 1 wagon of July *swoda*. Further I shall make the *swoda* for the months of October and November *pucca* hereafter. Please send a reply to this letter." On the 29th July, a letter dated the 28th July was despatched by the defendants to the plaintiff in which the same rates as were quoted on the 24th July were given. On the 29th July the defendants sent a telegram to the plaintiff in which they gave different rates from what were quoted in their letter dated 24th July. On the 30th July the plaintiff objected to the rates mentioned in the telegram:

Held, that the letter dated the 24th July constituted complete contract.

That the rate of damages was the difference between the price prevailing at Rungpur on the day of delivery and the contract rate plus the cost of freight and bags. **Madhusudan Koer v. Badridas** 93

——— Instituting civil action maliciously and without reasonable and probable cause; *See* Suit, maintainability of 495

———, assessment of—Contract, breach of; *See* Damages ... 93

Debt, wrongful detention of—Damages, if can be recovered; *See* Interest ... 348

Decided cases, long established, authority of, where not applicable; *See* Occupancy holding 510

Decision—Judges of Division Bench agreeing in one or more points, but differing in some points—Transactions, separate and independent; *See* Letters Patent, cl. (15), appeal under 447

Declaratory suit—*Surplus sale proceeds—Revenue Sale Law (Act XI of 1859), Sec. 31—Unrecorded assignee of recorded proprietor claiming on his own behalf—Representative—Title of unrecorded proprietor—Civil Court, jurisdiction of.*

Under section 31 of the Revenue Sale Law, an unrecorded assignee of a recorded proprietor is not his representative; so a Collector is justified in refusing to pay to such assignee, claiming on his own behalf, the money held in deposit as surplus sale proceeds of a sale held under the Revenue Sale Law, on account of the recorded proprietor:

The title of the unrecorded proprietor is not lost by such sale; he is entitled to receive the surplus sale proceeds, if he can establish in the civil Court, as against the recorded proprietor, that he is entitled to the estate at the time of the sale. He is then entitled to apply to the Collector on the basis of the civil Court decree. **Bejoy Lall Seal v. Nayan Monjori Dasi** ... 372

Decree, if valid—Sub-mortgagee getting a decree for enforcing sale of mofussil properties of mortgagor under leave—Letters Patent, cl. (12); *See* Sub-mortgage 272

———, propriety of, if can be challenged collaterally—Land acquisition proceeding—Order of the Judge of Probate Court; *See* Hindu widow ... 379

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Deity, property dedicated to, nature of ; *See* Pala, transfer of ... 37

Delay in presenting petition for dissolution of marriage on the ground of adultery, effect of—Delay due to poverty ; *See* Divorce 435

—— in presenting petition by husband for dissolution of marriage on the ground of adultery—Poverty ; *See* Divorce 435

Desertion subsequent to condonation—Revival of the effect of original adultery ; *See* Divorce 435

Difference of opinion between two Judges of the High Court—Propriety of order under section 145 of the Criminal Procedure Code—Judgment of senior Judge prevails ; *See* Letters Patent, clause 36 183

Discretion—High Court—Injunction restraining a party from proceeding with arbitration ; *See* Injunction 167

Disqualification—Judge, before elevation to Bench, engaged in the particular cause ; *See* Counsel 313

Divorce—*Adultery admitted—Co-habitation, resumption of—Condonation—Subsequent matrimonial offence—Condonation, cancellation of—Divorce, ground for revival of—Desertion by wife—Effect of original adultery, if revived—Petition by husband—Unreasonable delay—Poverty of petitioner, when an excuse—Indian Divorce Act (IV of 1869), Secs. 12, 13, 14.*

It is well settled that resumption or continuance of co-habitation with complete knowledge of all the circumstances operates as condonation.

Mere forgiveness is not condonation ; to be condonation, it must completely restore the offending party and must be followed by co-habitation. This is essentially the view adopted by the Indian Legislature in section 14 which requires that no adultery shall be deemed to have been condoned, unless where conjugal co-habitation has been resumed or continued. The expression conjugal co-habitation, or its equivalent connubial intercourse, should not be given a restrictive meaning but should be so interpreted as to leave the nature of the co-habitation or intercourse to be adapted to the varying conditions and circumstances of different parties.

Condonation of past matrimonial offences is however impliedly conditioned upon the future good behaviour of the offending spouse, and it follows that if after condonation, the offences are repeated, the right to make the condoned offences a ground for divorce revives ; to constitute a revival of the condoned offences, the offending spouse need not however be guilty of the same character of offence as that condoned ; any misconduct is sufficient which indicates that the condonation was not accepted in good faith and upon the reasonable conditions implied.

Desertion subsequent to condonation that would revive the effect of the original adultery exists if one party to a marriage without the consent or against the will of the other wilfully cause or without reasonable excuse makes the other live apart.

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Divorce—(*Contd.*)

The Courts look with great suspicion on petitions for dissolution of marriage presented on the ground of adultery, after long delay by a husband and relief is given *vigilantibus non dormientibus*; yet delay will generally be excused if it is really due to poverty:

But although poverty is almost always a sufficient excuse if convincingly established, it must not be supposed that there is no lapse of time where a line may be drawn.

Where admittedly the husband became aware of the adultery of the wife towards the end of the year 1913 and the petition for dissolution of marriage was presented on the 19th December, 1918, and no sufficient reasons were shown to justify the delay:

Held, that the petitioner has delayed action too long and cannot justly claim an order for dissolution of marriage. **Constance Catherine Mereno v. Henry William Bunn Mereno** 435

———, ground for, revival of—Offences repeated after condonation; *See* Divorce 435

Divorce Act, Sec. 14—Adultery, when condoned; *See* Divorce 435

————, Sec. 14—'Conjugal co-habitation', interpretation of; *See* Divorce... 435

Divorce Case—Procedure—Decree; *See* Marriage, dissolution of 340

Document—*"Agreement for a lease,"—Registration Act (XVI of 1908), Secs. 17 (1) and (2), 49—Admissibility of document incorporated in decree which would be otherwise inadmissible unless registered—Compromise of suit, proper procedure in—Code of Civil Procedure (Act XIV of 1882), section 375.*

An "agreement for a lease," which "a lease" is defined by the Registration Act, to include, is a document which effects an actual demise and operates as a lease. Such a document must be registered as required by the Registration Act. An agreement to grant a lease upon the happening of a contingent event at some future *indeterminate* date is not such an "agreement for a lease" within the meaning of the Registration Act, because an "agreement for a lease" within the Act creates a *present* and *immediate* interest in the land.

When a suit is compromised, the whole terms of the compromise should be incorporated in the decree, or in a schedule to the decree, and then a decree passed with regard to the subject matter of the suit. The decree taken as a whole would include the agreement which would then be admissible in evidence, even though it is a document which would otherwise require registration and would be inadmissible in evidence if not registered. **Rani Hemanta Kumari Debi v. The Midnapur Zemindari Company Limited** 298

Document, admissibility of, incorporated in decree which would be otherwise inadmissible unless registered; *See* Document 298

Documents, *production of—Criminal Procedure Code (Act V of 1898), Sec. 94—Charge upon belief—Counsel, duty of.*

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De cuments—(*Contd.*).

Under section 94 of the Code of Criminal Procedure, it is for the Magistrate to consider how many of the books are necessary for the purpose of investigation. A Magistrate should give definite instructions as to where and when the inspection is to be held and by which officer.

A charge upon belief, the grounds for which belief are not stated, and no facts are given, should not be introduced in an application to the Court. It is the duty of a counsel to see upon what the charges are based before he makes them. T. R. Pratt v. King-Emperor 188

Dower—*Mahomedan Law—Relinquishment—Time—Consideration, if necessary—Free consent—Verbal relinquishment.*

According to Mahomedan Law, the character of the obligation to pay the dower is a debt. The moment the dower is settled, it is enforceable as a debt. The dower becomes the property of the wife by the mere contract and she may therefore deal with or dispose of it before taking possession of the same. The woman is entitled to give it up or relinquish it in the continuance of the contract. It is not necessary that such relinquishment to be valid, must take place immediately after the husband's death. She can relinquish it at any time. It can be remitted in favour of the heir after the husband's death. No consideration is needed for such relinquishment. But free assent must be established. As the debt is enforceable under the Contract Act, it can also be released under section 63 of the said Act.

Quaere: Whether a dower debt could be discharged by verbal relinquishment? Nurunnesas' Khanum v. Khaje Mahammed Sakru ... 14

———, if can be relinquished; *See* Dower 14

———, nature of; *See* Dower 14

———, obligation to pay, is a debt; *See* Dower 14

———, relinquishment of, when to be made; *See* Dower 14

———, relinquishment of, how made; *See* Dower 14

——— debt, it can be discharged by verbal relinquishment; *See* Dower ... 14

Drainage—*Calcutta Municipal Act (III B. C. of 1899), Secs. 299, 575—Proceedings, abandonment of—Delay.*

The petitioner was convicted on the 28th of January 1916 for not having complied with the requisition which was served upon him in May 1915, requiring him to do certain things in connection with his premises and relating to the drainage therein: and, he was fined Rs. 2. He did not comply with the requisition and on the 15th of August 1916, a fresh complaint was made against him. The charge was for failing to comply with the requisition under section 299 of the Calcutta Municipal Act requiring him within 60 days to make a house drain emptying into the sewer and to do other matters (after being convicted and fined Rs. 2 on the 28th January, 1916). These proceedings were taken under section 575 of the Act. On the 29th of August, the accused's son appeared and said he was making arrangement for departmental execution of

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Drainage—(*Contd.*).

work. The order was—"Two weeks'-time allowed. Fix 12th September, 1916." On the 12th September proceedings were stayed for one month at the instance of the prosecution. On the 25th February 1919, an application was made to the Municipal Magistrate for the revival of the proceedings which were stayed in the case pending the disposal of party's application for departmental execution of work. On that the Magistrate made the following order on the 18th September "case revived. Issue summons for 16th October, 1919." On the 20th November, the petitioner was convicted and was sentenced to a daily fine of eight annas for 30 days from the 16th of May, 1916, that is, Rs. 15 in all:

Held, under the special circumstances of the case and the very great delay that occurred, namely, from the 12th of September 1916 till the 25th of February 1919 as nothing was done with regard to the proceedings, the proceedings were abandoned, and the order of the Magistrate convicting the petitioner of offences committed from the 16th of May and 30 days afterwards, was invalid. **Nando Lal Guha v. Corporation of Calcutta** ... 342

Ejectment—*Limitation—Rent, payment of—Rent, enhancement of—Presumption—Bengal Tenancy Act (VIII of 1885), Sec. 50 (2)—Kabuliat.*

Defendants Nos 1 and 3, who purchased the tenure in suit from defendant No. 4 paid rent for about 37 years and the rent was accepted from them.

Held, that the plaintiff could not get *khas* possession of the tenure as his right to do so was barred by limitation and hence could not ignore the right of defendants Nos. 1 and 3 who were entered in the record of rights as tenants.

The plaintiff produced a *kabuliat* of the year 1840 executed by the predecessor-in-interest of the defendant No. 4, the vendor of defendants Nos. 1 and 3. There was an express stipulation in the *kabuliat* that the tenants would pay enhanced rent according to the pargana rate;

Held, that the kabuliat might be considered either as a new contract under which the tenants agreed to pay enhanced rent, or as a contract containing receipts of the incidents of the tenancy which was in existence from before. The rent was therefore enhanceable. **Upendra Nath Ghose v. Dwarka Nath Biswas** 178

Endowment, manager of, power of; *See* Pala, transfer of 37

Endowment of recent date—Right of appointment of shebait—Founder making no provision for the devolution of office; *See* Shebait 174

Equitable mortgage—*Memorandum embodying contract—Title deeds, deposit of.*

Where the memorandum accompanying an equitable mortgage, does not embody the contract between the parties, but is a mere record of certain facts, an equitable mortgage may be established by the mere deposit of title deeds and the advance of money of such deposit, notwithstanding the Provisions of the Registration Act.

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Equitable mortgage—(*Contd.*)

Defendant No. 1 mortgaged certain properties to the plaintiff under two successive mortgage bonds, and delivered to him the title deeds of the property. Subsequently, she took a loan of Rs. 1,500 on executing the promissory note in suit. Simultaneously with the promissory note in question, a letter passed from her showing that the title deeds which remained in deposit with the plaintiff would remain as security for repayment of the loan. The memorandum was written after the promissory note, and after that plaintiff made the payment of Rs. 1,500.

Held, that there was no mortgage created before the letter was written **Bholrab Chandra Bose v. Agath Nath De** 375

Estoppel—*Suit, maintainability of—Suit to avoid* ganti *tenure—Kabuliat executed by settlement-holder in favour of* gantidars—*Settlement, conditions of—Abandonment.*

The *mehal* in respect of which the suit was instituted, was settled for a term of years with A. A created a *ganti* interest in favour of some of the defendants or their predecessors. His interest in the *mehal* was sold for arrears of Government revenue and was purchased by the plaintiff in the present suit. Shortly after the plaintiff's purchase, the settlement officer settled the rent payable for the *mehal* and the settlement was made on the basis of the rent payable by the *gantidar*. The plaintiff shortly after executed a *kabuliat*, in which he agreed to respect the recorded rights possessed by the under-tenure-holders, rights of the village headmen and others in the said estate. The *gantidars* were never in possession and exercised no right as *gantidars* but the plaintiff had not acquired any title by adverse possession:

Held, that the plaintiff was bound to recognise the *ganti* tenure and could not question its existence and hence a suit for a declaration that the defendants had no *ganti* interest in the disputed *mehal* was not maintainable:

There could be no abandonment by some of the *gantidars*. **Jarip Sardar v. Jogendra Nath Chatterjee** 78

Evidence—Family conforming to religious or social rites and usages consistent with Mitakshara law; *See* Burden of proof 52

———, admissibility of—Accused previously bound down under section 118 of the Code of Criminal Procedure; *See* Thieves, gang of, belonging to— 192

———, admissibility of—Answers given in examination—Unauthorized examination of insolvent; *See* Insolvent 209

———, *admissibility of—Evidence Act (I of 1872), Secs. 9, 11, 14, 15, 167—Accused, identity of—Association—Letters Patent, cls. (25) and (26)—Procedure—Jury trial—Reasonable certainty—Right to begin—Evidence of motive, if admissible—Criminal acts other than those covered by indictment, if admissible—Acts connected together—Evidence of collateral facts—Admissibility of evidence depends on what—Evidence of general disposition, habit and tendencies, if admissible—Evidence, admissibility of, by what law to be determined.*

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Evidence—(*Contd.*)

A and B were charged with theft committed in 1914, in the house of a prostitute; evidence was brought forward to show that C and D committed a theft in the house of another prostitute in 1918, in somewhat similar circumstances:

Held (*Chaudhuri, J.* dissenting), that the evidence was not admissible either under section 9 or under section 11 of the Indian Evidence Act to prove that A and B were the same persons as C and D.

Facts to establish that A and B had "hunted in couples," and, in several instances, taken part in thefts from rich prostitutes, that is, a series of incidents from 1914 to 1918 to establish that they have lived together and had transactions together, that a system had been followed by them, that they used to go about together under different names and had associated together with an evil motive, namely, the commission of thefts from rich prostitutes, were sought to be given in evidence:

Held (*Chaudhuri, J.* dissenting) that such evidence was not admissible either under section 14 or under section 15 of the Evidence Act.

(*Chaudhuri, J.* doubting) under clauses 25 and 26 of the Letters Patent, the case reserved or certified should be finally decided on review and not remitted for retrial:

(*Chaudhuri, J.* expressing no opinion). It is incumbent on the High Court, in cases reserved or certified, to investigate, whether, independently of the evidence objected to and admitted, there was sufficient evidence to justify the verdict of the Jury. In examining the evidence, the Court must consider, whether it can, with reasonable certainty hold that, even if the evidence improperly admitted had been excluded, the jury, upon the residue of the evidence, would have brought in a verdict of guilty.

The counsel for the accused has a right to begin and has a right to reply:

Per Mookerjee J.: The Indian Evidence Act prohibits the employment of any kind of evidence not specially authorised by the Act itself:

The gist of section 15 of the Indian Evidence Act is that unless there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact, that is, unless there is in substance some common link, they cannot form a series.

Evidence of general disposition, habit and tendencies, is not relevant.

Evidence of collateral offence cannot be received as substantive evidence of the offence on trial, though under section 14 of the Evidence Act, evidence may be given of intention and like matters where the factum of such intention or like matters is relevant.

The admissibility, not merely the weight, of the evidence depends upon the evidence of such conduct as would authorise a reasonable inference of a systematic pursuit of the *same* criminal object:

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Evidence—(*contd.*)

The Judicial Committee did not, by their decision in *Subrahmaniya* v. *King-Emperor*, overrule by implication the series of cases in Calcutta and Bombay where the High Court had, in cases reserved or certified, reviewed the evidence and determined the question of guilt of the accused. The decision of the Judicial Committee must be limited to cases of the type then before them, namely, where the trial had been conducted in a mode entirely prohibited by law, and cannot be extended to cases where evidence had been erroneously received or improperly rejected.

Per Chaudhuri, J. It is wrong to say that section 15 of the Indian Evidence Act only deals with intention as opposed to accident.

Evidence tending to show that the accused have been guilty of criminal acts other than those covered by the indictment is not admissible, unless upon the issue whether the acts charged against the accused were designed or accidental or unless to rebut a defence otherwise open to them 10

It is the general rule of law to admit evidence of motive. Evidence is admissible of any acts or doing of the person accused if such acts or doing are so connected with the transaction under charge or are of a character so similar thereto as to lead to a reasonable inference that the prisoner committed the act charged. **Emperor v. Panchu Das** 402

———, admissibility of—Previous conviction for an offence under Indian Penal Code; *See* Thieves, gang of, belonging to 192

———, admissibility of, against other accused persons—Accused approver, evidence of; *See* Thieves, gang of, belonging to 192

———, admissibility of, by what law to be determined; *See* Evidence, admissibility of 402

———, admissibility of, depends on what—Conduct—Criminal object; *See* Evidence, admissibility of 402

——— of Collateral offence, if can be received as substantive evidence of the offence; *See* Evidence, admissibility of 402

——— of general deposition, if relevant; *See* Evidence, admissibility of ... 402

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Evidence Act—Evidence not specially authorised by Act; *See* Evidence, admissibility of 402

———, Sec. 3—'Proved'—Strictly proved—Civil Procedure Code, O. 47 R. 1; *See* Review 134

———, Secs. 9, 11—Commission of Crime by other person in another place, in somewhat similar circumstances; *See* Evidence, admissibility of 402

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Evidence Act, Sec. 14—Evidence of intention, when can be given; *See* Evidence, admissibility of 402

———, Secs. 14, 15—'Hunting in Couples'—Series of transactions; *See* Evidence, admissibility of 402

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———, Sec. 14, scope of; *See* Evidence, admissibility of 402

———, Sec. 17—Admissibility in evidence—Answers given by insolvent accused on former proceedings; *See* Insolvent 209

———, Sec. 32 (2)—*Talab baki* paper; *See* Rent, suit for ... 68

———, Sec. 34—*Talab baki* papers, evidentiary value of; *See* Rent, suit for 68

———, Sec. 114 Ill. (e)—Purchaser obtained permission to bid—Evidence, absence of—Transfer of Property Act, Sec. 99; *See* Redemption, suit for 98

———, Sec. 132, scope of; *See* Insolvent 209

Examination of petitioner for search warrant—Procedure; *See* Search Warrant 267

Execution for costs—Mortgage decree—No personal liability in the decree—Court's decision *ex parte* that no supplemental decree under O. 34 R. 6 of the Code of Civil Procedure, necessary; *See Resjudicata* 382

Failure to decide a case—Judge, duty of; *See* Inherent power 48

Free consent—Relinquishment of dower debt; *See* Dower 14

Government of India Act, 1915, Sec. 107—Powers of High Court with respect to Subordinate Courts; *See* Jurisdiction 183

Grandfather's daughter's son's son, if excluded from inheritance altogether; *See* Probate 81

Grant, lost; *See* Presumption 501

Guardian, appointment of—Grandmother capable of keeping the child in suitable physical surroundings; *See* Guardianship 365

Guardianship—*Mother leading an irregular life—Guardian appointed, income of—Guardian, appointment of, considerations for—Mother, if permanently forfeits her right to the custody of child.*

Guardianship of a minor child is given temporarily to grandmother instead of to mother, who was leading a very irregular life at the time of the institution of the proceeding and her conduct was such that it would be wrong to confide a child to her.

The mere fact that the mother is unable to earn more than a small and possibly precarious income is in itself no reason for depriving her of the child.

The fact that the grandmother is able to keep the child in very suitable physical surroundings, has weight in the consideration of the question whether she should be appointed guardian.

The mother by such appointment, does not permanently forfeit all her natural right to the custody of her child. **Mrs. Winifred McQuillan v. Mrs. Winifred Chapman** 365

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Guardianship, if deprived—Mother unable to earn more than a small and possibly precarious income ; *See* Guardianship 365

——— of a minor child, if can be given to grandmother, instead of to mother ; *See* Guardianship 365

Guilty, plea of, passed on a mistake of law, effect of ; *See* Criminal Procedure Code, Sec. 412 122

Heirship, test of—Dayabhaga School—Spiritual benefit ; *See* Probate ... 81

High Court, if can deal with the case of an accused person not appealing against his conviction, in an appeal by another accused, and set aside his conviction ; *See* Misdirection 305

Hindu family migrating from one province to another—Law, custom and family relation ; *See* Burden of proof 52

—— family residing in a particular province—Law of place ; *See* Burden of proof 52

Hindu widow—*Administratrix—Selling immovable property with the leave of Court—Purchaser, if to prove legal necessity—Propriety of order or decree, if can be challenged collaterally.*

There is nothing in the Probate and Administration Act, which would justify a differentiation between the powers of an administratrix, who happened also to be a Hindu widow and heiress of her husband, and those of any other administrator under the Act.

A purchaser of property from a Hindu widow, who was an administratrix of her husband's estate, by virtue of leave obtained from the Judge of the Probate Court, is not required to prove the legal necessity for sale.

The propriety of an order or decree made in a cause, in which the Court has jurisdiction, cannot be challenged collaterally. This principle is applicable to a case where a party is seeking in Land Acquisition proceedings to go behind an order of the District Judge passed in his Probate jurisdiction many years ago : Chuni Lal Haldar v. Mokshada Debi ... 379

—— widow, as administratrix, power of ; *See* Hindu widow 379

Impartible Zamindari—Member of the family ; *See* Maintenance 91

——— Zamindari—Junior members ; *See* Maintenance 91

Improvement Trust, Board of, if required to delineate on the plan the building sites, before the scheme submitted to Government for sanction ; *See* Building sites 334

——— Trust, making enquiries under sub-section (2) of section 78 of the Calcutta Improvement Act, if disentitled to reject the application on the ground that it did not come within sub-section (1), of that section ; *See* Building sites 334

Indian Arbitration Act, Sec. 14—Objection, how proceeded with ; *See* Suit, maintainability of 283

Inference of fact—Lost grant ; *See* Presumption 501

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Inherent power—*Civil Procedure Code (Act V of 1908), Sec 151—Appellate Court—Misapprehension as to result of suit.*

On the 23rd May, 1919, a decree was passed on the Original Side of the High Court, allowing the claim of the plaintiff. On the 12th May, 1919, a receiver was appointed by the Alipur Court of the plaintiff's property. The receiver did not know of the suit until after the decree and the learned Judge of the High Court did not himself know when he passed his judgment on the 23rd May, of the appointment of receiver by the Alipur Court. An application was made by the receiver for substitution and for setting aside the order of dismissal of the suit and of the decree, dated the 23rd May. It however appeared that there was no order of dismissal of the suit. The learned Judge on the application thought that inasmuch as the suit was dismissed, he should exercise his discretion and refused the application:

Held, that the appellate Court should exercise the inherent power under section 151 of the Code of Civil Procedure to make such orders as might be necessary for the ends of justice. **Nilkanta Ghose v. Swarnamoyee Dassi** 130

———*Judge, duty of—Failure to decide a case—Substantial right of parties.*

It is the duty of a Judge to try the causes set down for trial before him and the failure of the Court to decide a case after submission cannot be permitted to defeat the substantial rights of a litigant.

The judgment-debtors and objectors, the petitioners, preferred an appeal against an order of the Subordinate Judge of Monghyr dated the 6th June, 1904, in the matter of an application for restitution in execution proceedings, in the High Court. The appellate Court on the 12th February, 1906, passed the following order: "We suggested to the learned Vakil for the appellants that perhaps the best way to deal with the case would be that the appeal should be withdrawn, leaving it to the present appellants, who are the judgment-debtors and objectors, to bring a suit to recover possession of the property in dispute, the present decree-holders, respondents, undertaking that neither the present proceedings for restitution, nor the fact that the previous suit brought by the present appellants was subsequently dismissed for non-prosecution on the 5th March, 1903, shall in any sense be treated as a bar to any fresh suit which the present appellants may be advised to institute in relation to the disputed property. Both parties agreeing, we by consent make the order accordingly."

On the 19th April, 1911, a suit was accordingly instituted in the Court of the Subordinate Judge at Monghyr. The suit was tried on the merits and was dismissed, on the 14th August, 1912. The plaintiffs lodged an appeal in the High Court on the 16th January, 1913. The appellate Court, of its own motion, on the 4th June, 1915, held that the suit was barred under section 103 of the Code of Civil Procedure of 1882 and dismissed it on that ground. The plaintiffs then applied on the 1st

PAGE.

Inherent power—(*Contd.*).

September, 1916, to rescind the order made by the Division Bench on their appeal on the 12th February, 1906, so that the appeal might be restored and heard on the merits:

Held, that the Court had inherent power to vacate the order to enable it to discharge the duty cast on it as a Court of justice to determine the controversy between the parties. **Kalyan Singh v. Ramgolam Singh** ... 48

Injunction—*Award, invalidity of—Practice, difference in—Discretion.*

It is a matter of procedure and not of substance that the party complaining of the invalidity of award would have to apply to the Court to have the document taken off the file. An interlocutory injunction should not be granted upon novel considerations interfering with arbitrators by reason of difference in practice between the Arbitration Act and the provisions of the English rules.

Assuming that the High Court has jurisdiction, it is entirely in its discretion to grant or refuse an injunction restraining a party from proceeding with arbitration. **Joytal & Co. v. Gopiram Bhotica** 167

————, grant of—Equally efficacious remedy can be had; *See* Perpetual injunction 259

————, right to; *See* Perpetual injunction 259

————, right to—Specific Relief Act, Secs. 53, 54, 56; *See* Perpetual injunction 259

————, restraining a party from proceeding with arbitration—Discretion—High Court; *See* Injunction 167

Insolvency, *application for—Several debtors—Mitakshara joint family.*

A joint application against 7 persons, members of a joint family, who are jointly liable, for insolvency, is not maintainable: **Kali Charan Saha v. Hari Mohan Basak** 206

Insolvent—*Charge against—Presidency Towns Insolvency Act (III of 1909), Secs. 36, 103 A (1)—Charge, error or irregularity in, effect of—Charge of alternative intentions—Notice of charge—'Concealing'—Preventing production—Removing a document—Books purposely withheld, how to prove—Appellate Court, power of—Finding on a charge—Omission by trial Court—Voluntary statement—Statement by accused in examination without objection—Evidence Act (I of 1872), Secs. 17, 132—Admission—Statement of the accused in former proceeding—Compulsion—Illegal compulsion—Court's power to examine an insolvent—Witness' story, part of.*

No error or irregularity in a charge framed in a proceeding under the Presidency Towns Insolvency Act, will call for a reversal of an order unless it in fact has occasioned a failure of justice and in determining whether there is so the Court shall have regard to the fact whether the objection could, and should have been, raised in an earlier stage of the proceedings.

If an accused receives notice that the prosecution may seek to prove against

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Insolvent—(*Contd.*).

him either of two alternative intentions he cannot, as he must be ready to meet a charge, in respect to both, be prejudiced by a charge of having had both intentions. Concealing is a form of defeating the object of the Presidency Towns Insolvency Act, and therefore, the second intention must refer to other modes of defeating the Act. There is nothing to prevent an accused having had both intentions.

It is generally necessary that an insolvent should have notice of the charge which it is proposed to make against him.

Removing a document is a mode of preventing its production and therefore a notice to the effect "surreptitiously and dishonestly removed or caused to be removed from the custody of the Official Assignee your diary for 1918," is sufficient, though the terms of this offence a e not those mentioned in section 103 of the Presidency Towns Insolvency Act.

To establish that books are purposely withheld, it must be shown that they exist, for preventing presupposes existence.

The appellate Court with all the materials before it, can, in appeal, make a finding of the intent, if this was omitted *per incuriam* by the Judge.

The words "Any person" in clause (2) of section 36 of the Presidency Towns Insolvency Act, refer to the same words in clause (1). Such person may be brought up for examination. But this cannot be the insolvent.

The Court has power to examine an insolvent even if section 36 of the Act were not applicable. The Court must have full control of an insolvent.

A statement made by an insolvent in his examination without objection from him, is voluntary.

Section 132 of the Evidence Act makes a distinction between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, and gives him a protection in the latter of these cases only.

Answers given by the insolvent accused on the former proceedings are admission under section 17 of the Evidence Act; they are relevant and admissible unless excluded by sections 18 to 31 of the same Act. Even therefore assuming the examination of an insolvent was not authorised, the answers given on such examination without objection are none the less admissible. Even if there were compulsions, not being of the kind which excludes a confession, then under the Evidence Act the fact of compulsion might affect the weight of the evidence but not its admissibility.

It is open to a Court to accept part of the story of one witness who is not reliable if it be corroborated by another who is reliable. **Joseph Perry v. The Official Assignee of Calcutta** 209

Insolvent, Court, if can examine; *See* Insolvent 209

——, examination of, unauthorised—Answers given, if admissible in evidence; *See* Insolvent 209

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Insolvent, if to have notice of charge; *See* Insolvent 209

Interest—*Money due for work done—Delay in paying—No writing—No proof of actual loss—Contract Act (IX of 1872), Sec. 73—Interest Act (Act XXXII of 1839), Sec. 1.*

A creditor, if not entitled to any interest under the Interest Act, is not debarred from claiming interest by way of damages under section 73 of the Contract Act.

Section 73 of the Contract Act requires the creditor to prove actual loss:

Interest by way of damages is not recoverable for the mere wrongful detention of an ordinary debt.

The plaintiff built a house for the defendant and sued to recover Rs. 606-7 as. for labour and materials and Rs. 188 for interest. There was no written contract and no demand in writing of interest. It was not alleged that the plaintiff sustained actual loss by the detention of money:

Held, that neither under the Contract Act, nor under the Interest Act, the plaintiff was entitled to interest for the money due. **Prosonnomoyi Dhabani v. Gopal Lal Sinha** 348

———, arrears of, on mortgage—Suit for recovery of rent—Sum to be applied in satisfaction of interest due on mortgage; *See* Redemption, suit for 98

———, if can be recovered for the mere wrongful detention of ordinary debt; *See* Interest 348

Interlocutory injunction—Novel consideration—Difference in practice; *See* Injunction 167

Interlocutory order—*Proceedings, stay of—Arbitration—Impeaching contract—Misrepresentation to avoid contract.*

An arbitration proceeding is to be stayed when a plaintiff impeaches a contract on equitable grounds.

A misrepresentation should in fact materially induce the contract in order to give a right of avoidance. **G. M. Birla & Co. v. Jokhumull Premsukh** ... 158

Interpretation of statutory law; *See* Suit, maintainability of 283

Irregular sale, effect of; *See* Redemption, suit for 98

Joint application against members of joint family, jointly liable, if maintainable; *See* Insolvency, application for 206

Judge, acting as counsel, before elevation to the Bench, if can hear his former client's case; *See* Counsel 313

———, duty of—Trial of causes—Failure to decide a case; *See* Inherent power 48

———, if can decide a case of a party—Judge, before elevation to Bench, acting as counsel in other matters for one of the parties; *See* Counsel ... 313

Judgment—Document prepared by a party; *See* Thieves, gang of, belonging to 192

———, when conclusive—Essential pre-requisite—Civil Procedure Code, Sec. 11; *See* Sub-mortgage 272

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Junior members of impartible zamindari, if entitled to maintenance; *See* Maintenance 91

Jurisdiction—*Arbitration, reference to—Civil Procedure Code (Act V of 1908), Sch. II Para 1—All the matters in suit—All the parties interested must join in the application—Party not appearing in the suit, consent of—Order of reference made without consent of all parties interested, if valid—Award made on such reference, if valid—Rules regarding jurisdiction—Hardship—Technicality.*

A Court has no jurisdiction to make an order of reference under para. 1, schedule II of the Code of Civil Procedure, without the consent of all the parties including the party who does not appear, interested. If an order be made without the consent of such non-appearing party, it is illegal and an award made on such reference is also illegal.

Per Mookerjee J.—When a Court is called upon to decide a matter of jurisdiction, no question of hardship, no consideration of technicality can be permitted to affect the judgment.

The rules relating to jurisdiction should be strictly construed and the Court should be astute not to permit litigants to circumvent such provisions of the Code. **Laduram Nathmull v. Nandalal Karuri** 150

——— Consent of parties—Waiver—Acquiescence; *See* Sub-mortgage 272

——— *Criminal Procedure Code (Act V of 1898), Sec. 145—Magistrate, duty of—Likelihood of immediate breach of peace—Forcible dispossession.*

The basis of jurisdiction in a case under section 145 of the Code of Criminal Procedure is the likelihood of a breach of the peace.

A Magistrate cannot proceed under section 145 of the Code of Criminal Procedure when there is no likelihood of any immediate breach of the peace nor the occurrence of any disturbance.

A Magistrate is bound to satisfy himself, on grounds which are reasonable, that a breach of the peace is imminent in regard to a property of the description specified in section 145 of the Code of Criminal Procedure, that a dispute likely to cause a breach of the peace exists concerning them, and that the grounds stated by him must be such as would satisfy a Court of revision, before which such a case may be brought by any of the parties concerned.

A Magistrate's finding that the second party was forcibly dispossessed by the first party within two months before the institution of the proceeding, is not in accordance with law; but the High Court cannot interfere on this ground, as it is not a question of jurisdiction. **Siv Narayan Mukherjee v. Satish Chandra Ghoshal** 369

——— *Injustice—Criminal Procedure Code (Act V of 1898), Secs. 145, 435-439—High Court's power of interference—Government of India Act, Sec. 107.*

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Jurisdiction—(*Contd.*).

Per Newbould J.: An omission to join a party in proceedings under section 145 of the Code of Criminal Procedure is not an error of jurisdiction.

Per Hudq, J.: Ordinarily a question of adding parties in proceedings under section 145 of the Code of Criminal Procedure does not go to jurisdiction.

The power of revision by High Court of cases under section 145 of the Code Criminal Procedure is not confined to questions of jurisdiction alone. It has power of interference in all cases of injustice. **Moniram Bewa v. Mirjan Sardar** 183

——— *Jurisdiction, exercise of—Erroneous action of Court in exercise of jurisdiction—Civil Procedure Code (Act V of 1908), O. 23, R. 1—Order for withdrawal of suit—Order not within the scope of the rule—Order, if valid—Fresh suit with leave, if competent—Court trying subsequent suit, if competent to enter into question of legality of order.*

An order for withdrawal of a suit with leave to institute a fresh suit, made under Order 23, rule 1 of the Code of Civil Procedure, but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction; such order is consequently not null and void.

A fresh suit instituted upon leave so granted is not incompetent.

The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order.

Jurisdiction may be defined to be the power of a Court to hear and determine cause, to adjudicate or exercise any judicial power in relation to it: in other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value, and nature of the subject-matter. The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject-matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants. This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is of a fundamental character. Given such jurisdiction, one must be careful to distinguish *exercise* of jurisdiction from *existence* of jurisdiction; for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.

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Jurisdiction—(*Contd.*).

The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction, should be included in the conception of jurisdiction itself, is sometimes a question of great nicety.

In order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination. A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it.

Jurisdiction does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly.

There is a clear distinction between the jurisdiction of the Court to try and determine a matter, and the erroneous action of such Court in the exercise of that jurisdiction. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the Court does act. The boundary between error of judgment and the usurpation of a power is this: the former is reversible by an appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity.

When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question, is an exercise of judicial power or jurisdiction. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect.

A Court may have the right and power to determine the status of a thing and yet may exercise its authority erroneously; after jurisdiction attaches in any case, all that follows is exercise of jurisdiction, and continuance of jurisdiction is not dependent upon the correctness of the determination.

Hridoy Nath Roy v. Ram Chandra Barna Sarma 482

——————, classification of; *See* Jurisdiction 483

——————, continuance of—Judgment, correct; *See* Jurisdiction ... 482

——————, Court judicially considering and adjudicating question of—*Res judicata*; *See* Sub-mortgage 272

——————, exercise of; *See* Jurisdiction 483

——————, exercise of, what is; *See* Jurisdiction 483

——————, how exercised; *See* Jurisdiction 483

——————, question of—Hardship and technicality; *See* Jurisdiction ... 150

——————, rules of, how construed; *See* Jurisdiction 150

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Jurisdiction of Court, conditions essential for creating and raising, extent of; *See* Jurisdiction 483

——— of Court to grant a review; *See* Review 134

——— of Court to try and decide a matter, and erroneous action in the exercise of that jurisdiction, distinction between; *See* Jurisdiction ... 483

Jurors, *report of—Absence of some of the jurors at the time of investigation—Report, if legal—Report, if can be acted upon—Magistrate, duty of.*

A report of the Jurors under section 133 of the Criminal Procedure Code, is defective when any four out of five jurors were present at the time of of the investigation. Such a report is illegal and not to be relied on. The Magistrate should allow the proceedings to go on with a fresh jury.

Srimati Dasya v. Nibaran Chandra Ghose 371

Kabuliat executed by mortgagor to mortgagee as regards mortgaged land—Parties, relation between; *See* Redemption, suit for 98

Lands, mortgaged, let out to mortgagor, if alters the relation between parties; *See* Redemption, suit for 93

——— acquired, market value of; *See* Land acquisition 563

Land acquisition—*Land Acquisition Act (I of 1894), Sec. 23, Sub-sec. (1) cl. (1)—Value of land—Market value of land—Tenant-at-will, interest of.*

The value of land acquired under the Land Acquisition Act, should ordinarily be determined as a whole and the question of apportionment of the compensation awarded amongst claimants of different degrees should thereafter be taken into consideration.

The market value of land is the price when it is offered for sale by one who desires but is not obliged to sell and is bought by one who is under no necessity of having it.

In the determination of the question of market value, a Court has to look to the commercial value rather than to abstract legal rights.

Though the interest of a tenant may be so precarious that he and his transferee may be compelled to leave the land at the will of the superior landlord, his interest cannot be said to have no market value. **Sadhu Charan Roy Chowdhury v. Secretary of State for India in Council** 63

Land acquisition—*Market value—Hypothetical landlord and tenant—Vacant land.*

The land when acquired, was vacant. Both the Collector and the Land Acquisition Judge in making the award assumed the existence of a hypothetical tenant on each plot and calculated the respective values of what were designated as landlord's interest and raiyat's interest. The total of the sums which represented the value of these interests was taken as the value of the land:

Held, that the award was based on unsound principle.

How much was recoverable by a landlord from a hypothetical tenant might be determined with some approach to accuracy from the rent receivable

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Land acquisition—(*Contd.*).

by him. But the exact value of the raiyat's interest was dependent on a number of unknown factors. **Hem Chandra Chowdhury v. Secretary of State for India in Council** 204

Land Acquisition Act, Sec. 23 Sub-section (1) cl. (1)—Market value of land; *See* Land acquisition 63

Landlord, sole, if can sell in execution of a money decree the occupancy holding; *See* Occupancy holding 510

Landlord and tenant—Kabuliat executed by mortgagor to mortgagee; *See* Redemption, suit for 98

Law, pure question of, if can be raised at the hearing of appeal—Point not raised in primary Court, nor mentioned in memorandum of appeal; *See* Perpetual injunction 259

—— governing Hindu population of Bengal—Migration; *See* Burden of proof 52

Legal necessity, if to be proved—Purchase from Hindu widow, after leave obtained from Judge of Probate Court—Hindu widow, administratrix of husband's estate; *See* Hindu widow 379

—— necessity, proof of—Mortgagee from a Hindu widow of a portion of her husband's estate—Mortgage granted after widow obtaining permission from probate Court; *See* Letters of administration 3

Letters *of administration—Grant to Hindu widow, effect of—Alienation by Hindu widow, after obtaining permission—Legal necessity, if to be proved—Civil Court, if can decree the nullity of letters of administration.*

A mortgagee from a Hindu widow of a portion of her husband's estate, who advanced money after the grant of leave to the widow, who had obtained letters of administration in respect of the estate, to mortgage, is not under any obligation to inquire into legal necessity for mortgage. To challenge such a transaction, it is to be shown that the person who got the sanction knew that the facts were false or that he was instrumental in getting the order from the Court upon false representation:

A civil Court has no jurisdiction to declare the order as to grant of letters of administration as null and void. The proper Court to set aside the letters of administration is the Probate Court. **Annada Charan Mandal v. Atul Chandra Malik** 3

Letters Patent, cl. (12)—"Carry on business"; *See* Suit, maintainability of ... 327

——————, cl. (12)—"Carry on business"—Granting rights to managing agent; *See* Suit, maintainability of 327

——————, cl. (12)—Leave to sue for enforcing sale of mofussil properties of mortgagor by sub-mortgagee; *See* Sub-mortgage 272

——————, cl. (15)—Judgment—order refusing to issue commission to examine witnesses; *See* Appeal 162

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Letters Patent, *Cl. (15), appeal under—Agreement as to some points by the Divisional Bench—Decree—All points open for consideration—Registration—One of the parties appearing for registration, effect of.*

Where the transactions were separate and independent, and if the learned Judges of the Division Bench were agreed as to one or more of them, effect should be given to their view, though they disagreed as to another or the others.

The whole case is open in an appeal under the Letters Patent against the decision of the Division Bench and all the points necessary to be investigated for the determination of the question of the correctness of the decree are open for consideration :

Where a document is executed by one of two parties on behalf of himself and the other, he is competent to present it for registration and the registration is not invalid for non appearance of the other party : **Gopeswar Pyne v. Hem Chandra De** 447

———, Cls. (25) and (26)—Case reserved or certified—High Court, duty of—Evidence, examination of—Improper admission or rejection of evidence ; *See* Evidence, admissibility of 402

———, Cls. (25) and (26)—Case reserved or certified should be finally decided and not remitted ; *See* Evidence, admissibility of ... 402

———, *clause 56—Difference of opinion—Opinion of senior Judge prevails.*

Per Curiam : A difference of opinion between two Judges of the High Court regarding propriety of an order under section 145 of the Code of Criminal Procedure is to be dealt with under section 36 of the Letters Patent and the judgment of the senior judge prevails :

Section 439 of the Code of Criminal Procedure, is to be read along with and subject to the provisions of section 435 :

If a case is outside section 435 of the Code of Criminal Procedure, section 439 cannot apply to it. **Mosiram Bewa v. Mirjan Sardar** ... 183

Limitation—*Decree, execution of—Limitation Act (IX of 1908), Sch. I. Art. 182 Cl. (5)—Application in accordance with law—Application for substitution of legal representatives.*

An application was made for execution of decree on the 26th March, 1912. Subsequently on the 26th March, 1915, another application for execution was made. The judgment-debtor died before that application was made. The decree-holder therefore prayed in that application that the legal representatives of the deceased judgment-debtor might be substituted in his place after issue of notice to them, and that the decretal amount be realised by attachment of movables. The Court thereupon made an order that the process fee be paid within three days for service of notice on the legal representatives of the deceased judgment-debtor. The fee, however, was not paid and the execution case was dismissed on the 30th March, 1915. On the 16th February, 1917, the present application for execution was made :

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Limitation—(*contd.*)

Held, that the present application was not barred, as the application dated 26th March, 1915, was in accordance with law within the meaning of article 18a cl. (5) of the Limitation Act. Aftabuddin Ahmed v. Jogendra Narain Tewari 389

———*Dispossession—Private purchase—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3.*

The plaintiff and certain other persons were the heirs of A. The defendants Nos. 1 and 2 were the co-sharer landlords of the jote which was held by A. On the death of the latter, the defendants Nos. 1 and 2 dispossessed the plaintiff from the land, they having secured a *kabala* of the entire land from defendant No. 8, one of the heirs of A. In a suit for joint possession in respect of the plaintiff's share of the land :

Held, that the suit was governed by article 3 schedule III of the Bengal Tenancy Act. Nabin Chandra Saha v. Sheikh Wajid 199

——— Khas possession—Payment of rent for 37 years ; *See* Ejectment ... 178

——— *Limitation Act (IX of 1908), Sec. 20—Interest, part payment of—'Agent duly authorised'—Authorised by act of parties—Karta of joint family.*

The words 'agent duly authorised' in section 20 of the Limitation Act, include authority given by law as well as authority given by the act of parties.

A suit was instituted on the 4th April, 1912, against defendants Nos. 1 and 2, sons of A, for enforcement of a mortgage bond, dated the 21st August, 1900, executed by A and defendant No. 1. The amount was borrowed for family purposes, viz., for defraying the marriage expenses of defendant No. 1. A mortgage decree was passed in favour of the plaintiff and the mortgaged properties were sold in execution of such decree. The sale proceeds having proved insufficient, an application was made for a personal decree in respect of the balance. A part of interest was paid on the 12th April, 1906, from funds belonging to both defendants, by defendant No. 1 who was at the time the *Karta* of the joint family, the father having died in the meantime. The defendant No. 2 was a minor. The defendant No. 1 in making the payment purported to act for himself and for his minor brother :

Held, that the application for personal decree was not barred by limitation, as the payment of interest saved the bar of limitation under section 20 of the Limitation Act.

That defendant No. 1 was an agent of defendant No. 2 duly authorised to make such payment. Chandra Kanta Bhattacharjee v. Behari Lal Bhattacharjee 7

——— Pleader practising without license—Complaint lodged within 3 months—Calcutta Municipal Act, secs. 578, 631 (1) ; *See* Professional license 127

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Limitation—*Review—Small Cause Court decree—No deposit of cost in time—Provincial Small Cause Courts Act (IX of 1887), Sec. 17—Limitation Act (IX of 1908), Sec. 5.*

A suit was brought by the plaintiff in the Small Cause Court for Rs. 125 and at the first hearing the suit was dismissed with costs. On the 15th day the plaintiff made an application for review of judgment without depositing the costs. After the expiry of the period of limitation, on the application of the plaintiff, Court made an order that the amount of costs should be deposited within a fixed time. The deposit being made the Court entertained the review and eventually gave judgment for the plaintiff:

Held, that the order granting the review of judgment was not in accordance with law and that the review should not have been entertained.

Quære: Whether section 5 of the Limitation Act is applicable to such a case. **Abdul Shaikh v. Mahammad Ayub** 197

Limitation Act, Secs. 3, 5—Provincial order admitting appeal filed out of time and respondent not objecting at hearing—Appellate Court, if can, *suo motu*, dismiss on the ground of limitation; *See* Appeal 1

————, Sec. 10—Suit by a mortgagor to enforce a trust in his favour; *See* Redemption, suit for 98

————, Sec. 20—'Agent duly authorised'—Authority given by law as well as by act of parties; *See* Limitation 7

————, Sec. 20—Interest, part payment of—Karta of the joint family; *See* Limitation 7

————, Sch. I. Arts 120, 148—Suit to enforce a trust—Suit for redemption—Mortgagee purchasing equity of redemption in execution of his mortgage decree; *See* Redemption, suit for 98

————, Sch. I. Art. 148—Suit by a mortgagor to enforce a trust in his favour; *See* Redemption, suit for 98

————, Sch. I. Art. 182 cl. (5)—Application in accordance with law—Application for substitution of legal representative of deceased judgment-debtor—Application struck off for non-prosecution; *See* Limitation 389

Litigant, if can instruct counsel directly; *See* Counsel 313

————, when entitled to an injunction; *See* Perpetual injunction 259

Lost grant; *See* Presumption 501

Magistrate, duty of—Officer's opinion; *See* Search warrant 267

————, duty in a case under section 145 of the Code of Criminal Procedure; *See* Jurisdiction 369

Maintenance—*Impartible zamindari—Custom—Burden of proof.*

Apart from custom and from certain near relationships to the holder of an impartible zamindari the junior members of the family of the zamindar

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Maintenance—(*Contd.*).

have no right to maintenance out of it, and there is no invariable custom by which any member of the family beyond the first generation from the last holder can claim maintenance as of right.

The burden of proving the custom is on the person who alleges it. **Maharajah of Jeypore v. Sri Sri Sri Vikrama Deo Garu** 91

————, right of, a recurring right ; *See* Pauper suit 351

————, right of, how extinguished or modified ; *See* Pauper suit ... 351

Market value—Court's duty ; *See* Land acquisition 63

——— value—Tenant-at-will's interest ; *See* Land acquisition 63

——— value—Vacant land—Hypothetical tenant and landlord ; *See* Land acquisition 204

——— value, how determined ; *See* Land acquisition 63

——— value of land acquired ; *See* Land acquired 63

Marriage, *dissolution of—Indian Divorce Act (IV of 1869), Sec. 14—Marriage, solemnization of—Marriage, date of.*

In a divorce case before a final decree is made the Court must come to a distinct finding upon the question whether the marriage was solemnized in India and upon what date, though there is a statement in a verified petition for dissolution of marriage that the parties were married to each other in British India according to the doctrine of Christianity. **Singrai Santhal v. Paraigi Santhalni** 340

————, dissolution of, petition for, on the ground of adultery, delay in ; *See* Divorce 435

Measurement, standard of—Tenancy, inception of—Kabuliat, inconsistent with ; *See* Presumption 202

Member, *expulsion of—Committee, when can expel—Rules of natural justice.*

The Committee empowered to expel a member must make a fair enquiry into the truth of the alleged facts, after giving notice to the member concerned that his conduct is about to be enquired into and giving him an opportunity of stating his case to them.

In order to determine whether a tribunal, which exercises a punitive jurisdiction on an alleged charge of misconduct whereby a man may be deprived of his property, in the exercise of *quasi* judicial powers, has given a decision which cannot be successfully challenged, the Court has to investigate whether they have observed the rules of natural justice and also the particular statutory or other rules, if any, prescribed for their guidance : The rules of natural justice demand that a man is not to be removed from office or membership or otherwise dealt with to his disadvantage, without having a fair and sufficient notice of what is alleged against him and an opportunity of making his defence ; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these con-

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Member—(*Contd.*).

ditions are satisfied, a Court of justice will not interfere with the decision. **Mohamed Kalimuddin v. A. B. Stewart** 247

Memorandum accompanying an equitable mortgage, a mere record of certain facts, if to be registered; *See* Equitable mortgage 375

Migration—Hindu family—Law, custom and family relation; *See* Burden of proof 52

Misconduct—Connection with conduct of pleader in his practical and immediate relation to Court; *See* Pleader, suspension of 471

——— unfitness to discharge professional duties—Disciplinary measure; *See* Pleader, suspension of 471

———, criminal—Trial and conviction—Disbarment; *See* Pleader, suspension of 471

Misdirection—*Accomplice—Offence under alternative case upon same state of facts—Evidence of a participator of crime—Man of low morality—Testimony of accomplice.*

Per Chaudhuri and Shamsul Huda, JJ.: One G, a witness for the prosecution and a gomosta of a Marwari firm, loaded 135 bags of rice weighing about 254 maunds in a wagon at a station D to be sent to R and they were so sent. The proper charge for the consignment was Rs. 20-11 as. The Railway books showed an entry of Rs. 8-4 as. against this item which was put down as 60 bags weighing 190 mds. The entry in the rokur of the Marwari firm showed a debit of Rs. 10-4 as. namely, Rs. 2 more. The actual quantity proved to have been sent was 254 mds. and the Railway books at D contained untrue entries. Rs. 8-4 as. was the proper charge for 100 mds., but having regard to the quantity, the Railway should have been paid Rs. 12-7 as. more. G's statement was that the Station Master asked Rs. 10-4 as. from him as freight and he paid that sum. The entries in the Railway books were made by the Goods clerk and his statement was that he made them under the directions of the Station Master accused:

Held, that the offence in respect of the sum of Rs. 2 was either receiving a bribe, or that of criminal breach of trust.

That G was an accomplice in respect of an offence under section 161 of the Indian Penal Code, which was an alternative case practically upon the same facts.

Per Chaudhuri and Newbould, JJ.: A Judge misdirects when he tells the jury that the statement of one accused may be taken for what it is worth against the other.

Per Newbould, J.: The word '*accomplice*' is not defined in the Evidence Act or in any other Indian Statute. An indication of its meaning may be found in section 337 of the Criminal Procedure Code. There the word accomplice is used in the marginal note and the section itself refers to "any person supposed to have been directly or indirectly concerned in the offence under enquiry."

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Misdirection—(*Contd.*)

A witness who is alleged to have taken part jointly with the accused in an offence different from that for which the accused is being tried, is not an accomplice.

Per Shamsul Huda, J.: To constitute an accomplice there need only be the intention for assisting in the commission of a crime: he need not know exactly what crime is being committed.

An accused person cannot be convicted solely upon the evidence of a person who is more or less a participator in the crime of which he is accused. His evidence is no better than that of an accomplice.

There is nothing to prevent a man of low morality being believed by jury but if that person is an accomplice, it is unsafe to convict on his uncorroborated testimony. It casts upon the Judge the duty of warning the jury against acting on such testimony.

The corroboration must be by evidence sufficient to connect the accused with the offence charged. **Suryya Kanta Bhattacharyya v. King Emperor** ... 20

———— *Omission to warn jury not to pay heed to the result of previous proceedings—High Court, power of, to deal with accused person not appealing—Conviction of non-appealing accused set aside, while considering the cases of another accused.*

An omission by a learned Judge to warn the jury to pay no attention to the result of the previous proceedings, amounts to misdirection.

Under section 439 of the Code of Criminal Procedure, the High Court has power, in a proper case, while trying the appeal preferred by another accused, to deal with the case of an accused person not appealing against his conviction and set aside his conviction: **Mir meerze Ali v. King Emperor** 305

Misrepresentation to avoid contract; *See* Interlocutory order 158

Mortgage by administrator, after leave obtained, how challenged; *See* Letters of administration 3

Mortgagee, simple, if can apply for appointment of receiver; *See* Receiver ... 385

————, when can invite the Court to appoint a reciever, and thus deprive the mortgagor his possession; *See* Receiver 385

———— from a Hindu widow of a portion of her husband's estate, if to prove legal necessity—Money advanced after grant of leave to administrator to mortgage; *See* Letters of administration 3

———— obtaining leave to bid, effect of; *See* Redemption, suit for ... 98

Mortgagor, remedy of—Mortgagee purchasing equity of redemption in execution of his mortgage decree in contravention of section 99 of the Transfer of Property Act; *See* Redemption, suit for 98

————, when can maintain a suit for redemption—Mortgagee purchasing equity of redemption in execution of his mortgage decree—Transfer of Property Act, Sec. 99; *See* Redemption, suit for 98

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Mortgagor and mortgagee—Landlord and tenant—Mortgaged land let out to mortgagor; *See* Redemption, suit for 98

Mother, if permanently looses her natural right to the custody of child by the appointment of grandmother as guardian; *See* Guardianship 365

Motive, evidence of, if admissible; *See* Evidence, admissibility of 402

Movables, *attachment of—Attachment before judgment—Provincial Small Cause Courts, powers of—Civil Procedure Code, Ss. 7 cl. (b) 94, order L*:

A provincial Small Cause Court has the power to attach movables before judgment.

For the purpose of interpreting clause (b) of section 7 of the Code of Civil Procedure, an attachment before judgment is not one of the interlocutory orders there referred to.

The only orders excluded from the jurisdiction of Small Cause Courts are those specifically mentioned in section 94 as injunctions or interlocutory orders, that is to say, order under clause (c) or clause (e) of section 94. **Kumud Behary Pal v. Hari Charan Sardar** 179

Navigable river, public, beds of—Crown, property of; *See* Revenue, settlement of 320

Notice—*Non-service, effect of—Sale, if valid—Bengal Tenancy Act (VIII of 1885), Sec. 158 B (2).*

The provision as to giving of notice of application for execution of decree as mentioned in section 158 B (2) of the Bengal Tenancy Act is mandatory and the failure of the Court to serve such a notice affects the validity of sale made in execution of rent decree. **Sarip Hochan v. Tlottama Debi** 73

———, sufficiency of—"Surreptitiously and dishonestly removing or causing to be removed from the custody of the official Assignee your diary for 1918"; *See* Insolvent 209

Objection, when to be raised—Error or irregularity—Charge framed in a proceeding under the Presidency Towns Insolvency Act; *See* Insolvent ... 209

Occupancy holding—*Decree, execution of—Landlord holding money decree against occupancy raiyat—Landlord, if can sell the holding in execution—Authority of long established decided cases—Occupancy raiyat, interest of—Bengal Tenancy Act (VIII of 1885), if exhaustive.*

The sole landlord of a raiyat is competent to sell in execution of a money decree against the raiyat, his occupancy holding, whether the holding be or be not transferable by custom or local usage.

The transfer of the whole or part of an occupancy holding is operative as against the raiyat, whether it is made voluntarily or involuntarily.

The doctrine that the authority or long established decided cases is to be maintained, is not of universal application. It has no application where the decision does not embarrass trade or commerce, nor affects transactions which may have been adjusted, rights which may have been deter-

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Occupancy holding—(*Contd.*)

mined, titles which may have been obtained or personal status which may have been acquired.

Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and specially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, it is the duty of the Court of ultimate appeal to over-rule them, if it has not lost the right to do so by itself expressly affirming them.

Whatever might have been the earlier law, the occupancy raiyat enjoys under the Bengal Tenancy Act substantial rights in the land and his interest cannot be appropriately described as a merely "personal right" or "personal privilege."

The Bengal Tenancy Act is not a complete Code: It nowhere purports to give an exhaustive enumeration of all the incidents of occupancy right. **Chandra Benode Kundu v. Shaikh Ala Bux** 510

Occupancy holding, if can be sold in execution of a money decree against the raiyat by the sole landlord—Holding not transferable by custom or usages; *See* Occupancy holding 510

—— holding, transfer of, part or whole of, effect of, on raiyat—Transfer, voluntary or involuntary; *See* Occupancy holding 510

—— raiyat, interest of—'Personal right'—'Personal privilege'; *See* Occupancy holding 510

Offence, collateral, evidence of, if can be received as substantive evidence of the offence; *See* Evidence, admissibility of 402

Omission to warn jury not to pay heed to the result of previous proceedings; *See* Misdirection 305

Order, if valid—Court having no jurisdiction over subject matter; *See* Sub-mortgage 272

——, reversal of—Error or irregularity in charge framed in a proceeding under the Presidency Towns Insolvency Act; *See* Insolvent 209

—— of the Judge of Probate Court, if can be challenged in Land acquisition proceeding; *See* Hindu widow 379

—— refusing to issue commission to examine witnesses; *See* Appeal ... 162

—— remanding a case by appellate Court, in form and substance, an order under rule 23, order 41 of the Code of Civil Procedure; *See* Appeal ... 354

Pala, division by inheritance of—Division of *pala* by transaction *inter vivos* or by devise; *See* Pala, transfer of 37

——, *transfer of—Right of management and right of service in connection with temples, distinction between—Alienation to stranger—Private alienation—Custom—Property dedicated to deity, character of—Shebait,*

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Pala—(*Contd.*).

power of—Sale of Shebaiti right, if permissible—Worship, right of—Transfer inter vivos—Transfer by will—Deed of sale treated as a deed of gift—Sale of pala *apart from endowed property, if valid.*

The requisites of custom are that it should be ancient and invariable, uniform, reasonable, not immoral, certain and consistent. About its being ancient it must have existed "so long that the memory of man runneth not to the contrary."

There is a distinction between the right of management and the right of service in connection with temples, private and public, and between compulsory and private alienations. Private alienations are not absolutely prohibited, but alienations to strangers have not been favoured. In the case of private alienations, the prohibition is of general application and custom and usage govern and prevail over the text law which prohibits both partition and alienation.

Custom, if established, may render private alienations valid, but that in determining the question, the benefit to the idol must be taken into consideration as a matter of primary importance. Property dedicated to a deity is *extra commercium* and is entitled to special protection of the sovereign whose duty it is to intervene to prevent fraud and waste. Persons having the management and possession of the property of an idol must of necessity be empowered to do whatever may be required for the service of the idol for the benefit and preservation of its property. The manager of the endowment is by virtue of his office the administrator of the property attached to it. As regards the property he is in the position of a trustee. Sale of the trusteeship for pecuniary gain is not permissible. The sale of a priestly office for the benefit of a shebait is illegal.

Nitya Gopal Banerjee v. Provas Chandra Mukherjee 37

Pala, transfer of, apart from immovable property, if valid; *See* Pala, transfer of 37

Participator in the crime, evidence of—Accomplice; *See* Misdirection ... 20

Parties, relation between—Kabuliat executed by mortgagor to mortgagee as regards mortgaged land; *See* Redemption, suit for 98

Party, if can impeach the propriety of an order granting review, on the ground of contravention of the provisions of clause (b) of the proviso to rule 4 order 47 of the Code of Civil Procedure; *See* Review 134

—— claiming invalidity of award—Procedure; *See* Injunction 167

—— praying for review, duty of; *See* Review 134

Pauper suit—*Civil Procedure Code (Act V of 1908), O. 33, Rr. 5, 6, 7, 15—Suit for maintenance by wife—'Cause of action'—'Right to sue'—Maintenance, right to.*

Rule 15, order 33 of the Code of Civil Procedure is to be read along with the provisions of rules 5, 6 and 7. Rule 5 contemplates a summary rejection by the Court at the earliest stage of the proceeding. Rule 7 contem-

appear with greater pleasure. Your Lordship is universally courteous to all who appear before you and your uniform good temper coupled with your unrivalled ability and knowledge of law make the Court in which your Lordship sits a very pleasant place. We offer you our hearty congratulations on your high appointment. Let me assure you that any assistance which may be required from the members of the Bar will be given to you willingly and gladly? I sincerely hope and trust that your Lordship's term of office may be a successful one and that you may have health and strength to carry on the great traditions of this Court.

Babu Basanta Kumar Bose, senior Vakil present in Court, said: My Lord, the Acting Chief Justice of Bengal, in the absence of the Senior Government Pleader owing to ill health, I beg on behalf of the Vakils of your Lordship's Court to offer you our warmest congratulations on your appointment as Acting Chief Justice of Bengal. Yours has been a long and unique record of services rendered in various spheres of public activity, and we are all proud to feel that in whatever capacity you have been called on to serve your country, you have left a lasting impress of a master mind on your work. Your achievements have shed a lustre on the profession to which we belong and which claims you as one of its most illustrious members. It is to us a matter of special gratification that for the third time in the history of this Court a member of our body has been summoned to fill the highest judicial appointment in the land, although we recognise that under the present constitution such appointment must only be a temporary one. My Lord, once again we offer you our heartiest felicitations on the high honour which has been bestowed on you.

Babu Kali Nath Mitter Attorney-at-law said: My Lord, would your Lordship allow me on behalf of the Incorporated Law Society to offer you a few words of congratulation. I join with the Advocate-General and Mr. Bose in the remarks which have been made in congratulating your Lordship. Your Lordship is the third illustrious Indian who has been placed in that high position, the two previous ones being the late Sir Romesh Chunder Mitter and the late Sir Chunder Madhab Ghose. They have left names and reputations which no time will obliterate and I trust—I sincerely believe—that your Lordship will also leave that name. As an Indian I feel the utmost gratification and pride at your Lordship's appointment. I hope your Lordship will have long life and sound health to satisfactorily discharge the onerous duties which you are called upon to perform. I hope that your Lordship's duties will be

encouragement never grudgingly given. As a debater, his powers are unmatched. It is delightful to hear him at the Senate moving a motion or criticising an amendment. His command of facts and language is unrivalled and none but a born ruler of men can sway an assembly as does Sir Asutosh. Unwearied is his patience; resolute his will; wondrous and vigilant his tact. Here lies the secret of his immense power. He is to the younger generation an inspiration, an ideal, an example to follow, to live up to. He always recalls to our mind the famous lines of Goethe:

"Wonach soll man am Ende trachten?
Die welt zu kennen und nicht zu verachten"
[When all is said, the struggle of the wise
Must aim the world to know and not despise.]

May he live long for we need his guidance and his uplifting hand.

REFERENCE IN COURT.

A very pleasant function took place on wednesday the 24th March 1920 in the Chief Justice's Court room which was crowded with Barristers, Attorneys, Vakils and the general public when Sir Asutosh Mookerji the Acting Chief Justice of Bengal took his seat on the Bench with Mr. Justice Fletcher. Just at 11 o'clock after their Lordships had taken seat on the bench, members of the various branches of the legal profession practising in the Calcutta High Court took the opportunity of congratulating the Acting Chief Justice and all the time the reference was being made the whole Crowd stood.

The Advocate-General said:—My Lord, before the work of the Court begins may I be allowed on behalf of my brethren of the Bar and also on my own behalf to say a few words to your Lordship on the position to which your Lordship has been appointed. Your Lordship has been appointed by Government to act as the Chief Justice during the absence of the present Chief Justice. My Lord, that being so it becomes my duty, and my pleasure also, to congratulate you on that appointment. I can only tell your Lordship, that it is the universal feeling of the members of the Bar that no better appointment could have been made. We are aware that your Lordship is a great lawyer. No body reading any of your judgments could doubt that for a moment and in addition you have done great public work particularly in the matter of the University affairs in which so much of your time has been spent. Speaking for myself (and I have experience not only of the Courts in India but of the Courts in England) there is no Judge before whom personally I

will teach that Jehovah, Jove and Lord are all but one and the same; that there is no real and fundamental difference between the religions that be; that their mission is absolutely identical and that the true source of light is one and only one, the author of the universe, call Him by what name you will.

Glorious will be the day when India, hitherto torn by religious dissensions and embittered by religious feuds, will worship at the Temple of Truth and cease to be a fierce partisan of half-truths ever at strife with each other.

Addressing the convocation of the Calcutta University in 1913 Sir Asutosh said "the conviction is deep-rooted in my mind, that India with her great intellectual traditions, India which in olden times was one of the chosen seats of wisdom and learning, is expected, nay is bound to come to the front rank again, and take her place among those nations which are justly regarded as the leaders in the evolution of humanity in modern times." Words of hope and prophesy!

Yes! India is no longer now the India that she was half a century ago. New hopes have arisen; new dreams have been awakened; new aspirations have laid hold of the Indian mind. Education has begun its work, both its constructive and destructive work. Witness the growing spirit of unity and co-operation; the birth of that genuine patriotism which laughs death to scorn; the passionate yearning for political power; the dawning love of freedom of speech; the nascent feeling of *eneuis* triumphing over the sundering, dividing forces of yore. Do they not point to the approach of a new and happier age?

"I feel," says Sir Asutosh, "that a mighty new spirit has been aroused, a spirit, that will not be quenched; and this conviction is a deep comfort to me at the moment when I take leave from work dear to me for so many weighty reasons!!" This was said in his farewell speech as the Vice-chancellor of the Calcutta University.

And who has helped forward the birth of this new and mighty spirit? Surely the man who has done most for education in Bengal. And is it not that one—Sir Asutosh Mukerjee? Sir Asutosh's mind is eminently practical, and yet in his speeches we notice a glow of ardent passion; brilliant, soaring flights of imagination. He is not in any sense a dreamer and yet he has visions that peer into the future and seek to lift the veil of destiny. His sympathies are wide and extensive. Learning is a link and an ever-binding link with him, and learned men have an irresistible fascination for him. To these his help is never refused; his

the Calcutta High Court possesses a Judge who will compare with the best Judges of all times.

Long will he be remembered as a Judge but, perhaps, longer still as an educationist who saw the needs of his country with almost prophetic clearness. He has seen and he has felt, as all true lovers of this country must see and feel, that in education lies the salvation, the future of India. Education alone can and will secure for us that double emancipation, political and intellectual, which we so passionately, fervently long for. By political emancipation, we do not mean or suggest anything revolutionary, butwe mean a saner, loftier outlook on public affairs; greater participation in political life; a more intelligent, a more unflinching sense of duty. And nought but education can achieve these results; education in a higher, broader sense. And this is exactly what Sir Asutosh has long and steadily striven for. And the post-graduate classes of the University will, for ever, remain a monument of his political sagacity as also an enduring memorial of his loving love of learning. No one will contend that it is perfect, such a claim for any institution, will be absurd and extravagant at any time. It is, be it remembered, the first step and a long step towards the realisation of the true mission of a University which must needs claim all knowledge for its province. It must not only impart but must also widen, enlarge, amplify the boundary of knowledge. The post-graduate classes are not merely machineries for the diffusion and circulation of ready-made knowledge, but they are the preparatory schools of research and independent enquiries in all the domains of learning. Here lies their significance, their importance, their utility. Glory to Sir Asutosh for this noble work! Not only will education help onward the political but also the intellectual emancipation of India. Religion, here, is a force and power to reckon with, and not to disregard. It is the conservative element always at war with the liberal movements making for light and illumination. And what power on earth can check its influence, resist its sway? None, save education. We do not, for one moment, contend that the spread of education will be synonymous with the disappearance of religion. But we do say that with the spreading light and illumination, religion will no longer be what it is to-day:—namely, a spirit of antipathy towards those who are not of the same faith as we are, or a force continually urging us forward to silly warfare for the conversion of the world. It will lose its grosser, harsher aspect, and will wear a sweeter, mellower hue. It will inculcate toleration, humanity, justice, a spirit of charity and righteousness. It

gifts, many and varied, it was not long before he revealed high qualities as a Judge. Great was the expectation that the public formed of him, and that expectation was fully justified. From the day that he took his seat, the profession found in him a judge, keen and penetrating, supreme alike in law and facts; unwearying in patience, unfailing in courtesy. He extorted the admiration of the profession and earned the confidence of the public. And what can be a higher credential or a greater glory for a Judge than public confidence. In every civilised country judges are custodians of liberty and dispensers of justice, and confidence in them as such is as necessary for the administration of justice as it is for the maintenance of the Government which they represent. Is this confidence common and general in this country? Let the public and the profession answer? But whatever may be the answer one thing is clear, and certain beyond doubt that in Sir Asutosh the public, with one voice, has accepted and acclaimed such an one. We trust the days have irrevocably gone by when judges were expected to be lions, but lions under the throne.

Sir Asutosh has now attained the highest judicial post in Bengal. It was whispered in some quarters that this was the reward of seniority. No suggestion could be falser or more removed from the truth. It is the reward of merit—unapproached, unexcelled in Bengal. The lucidity, the grace and elegance, the cogency and precision with which facts are stated and points of law discussed, make Sir Asutosh's judgments pieces of literary workmanship and store-houses of fundamental doctrines. And it is this precisely which has secured for him so exceptional a reputation as a Judge. It were no exaggeration to say that in the handling of facts and law he has never had a superior in our days, perhaps, no rival. In his treatment of points of law it is impossible not to admire his exhausting knowledge and mastery of reported cases, and an extremely acute and exact appreciation of principles; complete power of extracting them from past cases and fitting them to the case in hand. Stupendous is his memory and often we hear from the Bench actually the number of page given where a particular case may be found. Many a long day we have sat in his court and have been struck by the quickness with which he seizes upon the points involved in a case and the readiness with which he furnishes cases for or against contentions put forward before him. There is no room for longwindedness there. His searching questions soon put an end to an unsound proposition or an untenable argument. We have read of Lord Cairns and Lord Westbury but we have seen Sir Asutosh. In him

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THE HON'BLE SIR ASUTOSH MUKERJEE, KT. C.S.I.

Sir Asutosh is too well known to require an introduction. For years the foremost figure in Bengal, he has won laurels as a Vakil, as a public man, as a Judge. To-day he sits as acting Chief Justice of Bengal and in this, his new sphere of duty he will, we doubt not, hold his own with the most distinguished of his predecessors. Contemporary sketches may be *pæans* or invectives. We shall make this sketch neither the one nor the other. We shall try, as best we can to explain the secrets of his great power and influence.

What strikes us as the most remarkable feature of the man is his wondrous untiring energy. Coupled with this is his fearless independence, and to crown all, his unfailing devotion to his country. His success in the profession was rapid and immense. He devoted himself wholly to his work, and never shrank from any pain. He won the respect and confidence of the Bench and the Bar. Though heavy was the burden of professional work, he took part in public affairs of the day, and as a member of both the Bengal and Viceregal Councils, he was never slow in putting forward his views, and that always with his characteristic firmness and vigour. He was ever true to his trust. He never sold the truth to serve the hour, and his public utterances bear noble testimony to the pains he took in mastering public questions, to the spirit of independence with which he put forth his views, and to the clarity and soundness of his political vision. With the acceptance of the judgship—the reward of his professional success—he had, however, to withdraw from the larger arena. The sphere of his activity was changed. As a Judge the doors of public life were shut against him, but a career of equal, if not greater usefulness, now opened. Endowed as Sir Asutosh is with

The main idea of criminality practically fixed.

special circumstances of a people require—the main idea of criminality—of "*mala in se.*" one might say—has practically remained the same for the last twenty centuries in India and in Europe and this clearly explains how Lombroso was able to note in twelve skulls of delinquents of the middle ages the same anomalies as shown by the skulls of modern criminals. There is a good deal of truth in Ferri's observation that "if we consider homicide, robbery, rape or forgery, we will find that from the Roman law to our own day, a period of about twenty centuries, the moral social and legal conceptions of these crimes, are fundamentally the same, whatever may have been the supervening changes in the forms of legal and social sanction, opposed to them" (*g*). It must be further observed that the science of criminology does not pretend to formulate absolute and eternal laws; it professes to deal only with the criminality of the civilised countries of the present day.

The second objection of the classical school considered.

Let us now advert to the second objection of the classical school which appears to be more serious than the first one, which, as we have already shown, is more technical than substantial and is based upon a misunderstanding of the claims of the criminological science. The objection is based upon the ethico-theological doctrine of the freedom of the human will which assumes that a human being at a given moment of time, is absolutely free to do or not to do a particular act and if he chooses to commit a crime, the cause of the crime is not to be sought outside him; the cause is his free choice of the act amongst alternatives This, of course, is the view of the metaphysician but there are some criminologists—amongst whom are such well-recognised authorities as Tarde and Salilles (the former of whom, by the way, Ferri characterises as a "hidden spiritualist")—who incline to this view. Tarde puts his case thus, "It is strange that when the criminologists of our day, whether naturalists or sociologists, look for the causes of crime, they find only impersonal factors like climate, social environment, season, race, cranial or other anomalies; in brief, they make crime a natural or sociological fact and depersonalise it. And later, when they come to the problem of the application of their theories to punishment, one is surprised to find them carrying the individualisation of punishment to the extreme, as though the individual, who hitherto was of no consequence, had suddenly become all important. A choice must be made; if we regard it established that punishment should be individually adjusted, we should also agree that crime and

Freedom of the human will.

Tarde's view of the freedom of will.

(*g*) Ferri's "Criminal Sociology" p. 76.

all past generations have produced certain definite nervous modifications, which, by transmission and accumulation, have become in us, faculties of moral intuition. We might not be all agreed as to the value of Darwin's or Spencer's hypothesis but this much we are bound to admit that "every race to-day possesses a sum of moral instincts, which are not due to individual reasoning, but are the inheritance of the individual quite as much as the physical type of his race" (*d*). I say, then, that our notion of criminality, based as it is upon our moral sense, is a product of evolution; and only in that way, it is liable to change and variation as much as every other product of evolution is liable to change and variation (*e*). Further, it must be borne in mind, that the notion of criminality has been forming through countless ages and generations and that explains how corrupt practices and customs—which have been always reprobated by the better minds of the community—have been slowly and gradually stamped out. The science of criminology must start with these fundamental generalisations of the Biological and Psychological Sciences and they lead us to two incontrovertible propositions—

Notion of criminality a product of evolution.

Two fundamental propositions with which criminology must start.

I. That the notion of criminality has not been implanted in our mind by the Author of our being, but that in the present state of society it has *become instinctive* like the moral sense in the ordinary civilised human being and

(*i*) notion of criminality not instinctive but has become instinctive.

II. That by the law of hereditary transmission certain characteristics—biological, psychological and sociological—have become ingrained in the criminal man and have given rise to what is known as the "criminal type" (*f*). Further, in this connection, I must distinguish between the born criminal and the occasional criminal. I shall show later on that while in the former the origin is largely biological, in the latter the origin is largely sociological.

(*ii*) hereditary transmission of characteristics.

With regard to the first objection of the exponents of the classical school, it will be observed that the positivists do not, and, in fact, cannot claim that the notion of criminality has been indelibly fixed in the human mind from eternity. What is actually claimed is that apart from some minor offences,—police-offences or the statutory offences, the "*mala prohibita*" of the Roman law—which are peculiar to a particular state or government and which the

The first objection of classical schools considered.

(*d*) Garofalo's 'Criminology' p. 8.

(*e*) See an article by Dr. A. L. Kroeber "Is Law and Morality instinctive" in July September 1910 number of the American "Anthropologist." According to the writer they are instinctive.

(*f*) See an article on "Heredity and Environment," Journal of Criminology Vol. II, p. 331.

pithily remarks? Professor Enrico Ferri in his 'Criminal Sociology' fully considers all the possible objections that can be raised against the investigations of the positive school with regard to the existence of what may be called the 'criminal type' and with regard to the physical, anthropological and sociological causes of crime and comes to the conclusion that the objections are mostly without foundation. I do not want to reproduce what Professor Ferri has so clearly shown in his book; all that I propose to do is to take up the broad and fundamental objections of the classical school and try and meet them from the point of view of the positive school. To my mind, the objections may be broadly classified under two heads:

Objections of the classical school.

(*i*) no fundamental idea of crime.

I. There is no fundamental idea of crime or criminality inherent in the human mind—the idea is created by the exigencies of social or political needs, and consequently,

(*ii*) a definition of the determinants of crime not possible.

II. It is not possible to define the cause or causes of crime nor is it possible to delineate the characteristics of the criminal or the delinquent type. A crime, like a sin, is due to the inscrutable fiat of the human will and the criminal is not a being standing apart from the average type of humanity.

The first objection discussed and answered.

In answering the first objection, it should be pointed out, at the outset, that although the idea of crime has varied from age to age and from place to place, the *notion of criminality* has practically remained the same and further, whenever we speak of the notions of crime and criminality we must think of people at a similar stage of culture and civilisation and with similar moral development. We must recognise with Darwin and Herbert Spencer that the moral sense of man is a product of evolution and we must further realise that the notion of criminality depends upon the moral sense of the community. That being so, it is really puerile to bring forward illustrations from prehistoric and savage communities—whose moral sense is generally at the lowest stage of evolution—to show that there is no such thing as a fundamental notion of criminality. The origin of the moral sense is attributed by Darwin to sympathy towards our fellow beings and sympathy depends upon the faculty of imagination, which, in its turn, depends upon factors which are products of evolution. According to Herbert Spencer, the moral sense or "moral intuitions" as he calls them, are "the results of accumulated experiences of utility gradually organised and inherited" so that "they have come to be quite independent of conscious experience" (*c*). The experiences of utility organised through

Moral sense, a product of evolution.

Spencer's view of moral sense.

(*c*) Spencer's "Data of Ethics" Chap. VII.

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PRINCIPLES OF CRIMINOLOGY—*(Continued).*

Nature, Origin and Determinants of Criminality.

But there is one question, raised by the opponents of the positive or the experimental school, which requires to be met at the outset. They ask for a definition of crime, because, they say that unless we define it, we cannot proceed with the study of the characteristics of the delinquent. It is pointed out that the notion of crime has varied from age to age, from place to place, according to the differences of social evolution, so that acts to-day declared the most criminal, such as parricide, have been and were permitted and even recognised as obligatory in other times and places (*a*). On the other hand, some acts which are not to-day classed as criminal, such as magic, witchcraft or blasphemy, were amongst the most serious offences in Europe of the middle ages and still are among many savages. Theft, we all know, if cleverly carried out, used to be encouraged at Sparta (*b*); infanticide and self-immolation of widows were practices well recognised in ancient India. How, then are we to distinguish the criminals of the ancient and medieval world from the criminals of to-day? Are the physical features and the psychic characteristics of the criminals, to which so much importance is attached by the advocates of the experimental school, changing along with the change in our conception of crime? In short, are not crimes, merely creations of statute-books or of the common law of the land—merely "political creations" as a French writer

Objection of the classical school based on the fact that the notion of crime is variable.

Crimes are merely creations of law.

(*a*) In Norway and Sweden, in ancient times, it was regarded as a duty of the son to kill his old and helpless parents. See Mercier's 'Crime and Insanity' p. 20.

(*b*) See Von. Bar's 'History of Continental Crimmal Law,' p. 9 [Foot notes].

Held (per *Piggot and Dalal JJ.*) that such an application does not fall within the scope of Order 39, rule 1 and as such cannot be entertained.

R. M.

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35 M. L. J. 666.
1918.
Arunachala Chettiar
v.
Muthu.

Succession certificate, holder of—Assignment—Right of assignee to recover debt without producing a succession certificate in his own name.

The question in this appeal was whether an assignee of the person to whom succession certificate had been granted would be entitled to a decree, in a suit for recovery of debts due to the estate of the deceased, without obtaining a succession certificate in his own name.

Held (per *Phillips and Kumaraswami Sastri, JJ.*) that such a person is entitled to a decree without even producing a succession certificate in his own name.

Their Lordships said that payment to the assignee would be as valid as payment to the assignor in the absence of any restrictions imposed by law. Further section 4 (1) of the Succession Certificate Act only requires the production of a certificate and not a certificate in the name of the person suing.

Allah Dad Khan v. *Sant Ram* (1) not followed.

Raman Lalji v. *Hari Das* (2) followed.

D. K. R.

(1) (1912) I. L. R. 35 All. 74. (2) (1916) 14 A. L. J. 677.

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quency on "biologico-social abnormality" and he defines crime as "a phenomenon of complex origin both biological and physio-social with different modalities and degrees according to the different circumstances of persons and things of times and places" (*x*). This view, then, strikes out a *via media* between the two extreme views as represented, on the one hand, by Dr. Lombroso and on the other by Tarde, Colajanni and Dr. Bonger. It has been aptly described by some critic as the Hegelian progress of synthesis of which the Lombrosian view represents the thesis and the extreme sociologic theory the anti-thesis. In the words of De Quiros, "Ferri's theory is the most scientific production of modern studies" and in it we find the "theory of criminal factors" which is the key to the modern theories of criminality. I shall next proceed to discuss the nature, origin and determinants of criminality from the different points of view indicated above.

Ferri bases the origin of criminality on bio-sociological abnormality.

Sitaram Bannerjee, M.A., B.L.

(*To be continued.*)

(*x*) 'Criminal Sociology' p. 122.

NOTES ON CASES.

Mahomedan Law—Suit for restitution of conjugal rights—Application for injunction to restrain defendants from giving lady in marriage, if maintainable.

1 U. P. L. R. 185. 1919.

Mohamed Yamin v. Razia Begam,

A Mahomedan, M, the husband of W brought a suit for restitution of conjugal rights and for a declaration of his legal status as the woman's husband. There was a cross suit based upon an allegation by the woman that she had ceased to be the wife of M, if she ever was, by reason of the fact, that she had exercised against him the option of puberty given by Mahomedan Law. Appeals from these suits are now pending. M has made the present application with a prayer that the defendants be prohibited from giving W in marriage to any one before the disposal of the aforesaid appeals. Question arose whether such an application could be brought within the purview of Order 39, r. 1, Civil Procedure Code.

cause the view that is adopted would condition and determine the remedial measures that may be proposed. But it would appear that there is a fundamental error in the basic principle of either school just as there is an error in extreme individualism or extreme socialism in the field of sociology. A human being is undoubtedly a creature of the society but at the same time it would be worse than exaggeration, to say that he is merely a social or economic phenomenon. The relation between the two is a relation of inter-action and inter-dependence. Poverty materialistic civilisation and capitalism are as much determinants of crime as heredity, age and alcohol and to wrangle about the priority as between the two sets of conditions would be very much like trying to solve the old quibble as to the whether the hen is the cause of the egg or the egg the cause of the hen. As I have said before, the primary object of criminal science is to find out the cause of crime and the cause of such an extremely complex human phenomenon is bound to be a combination of several conditions—social, psychic and biological, and it will only land us in a philosophical quagmire were we to lend ourselves to a metaphysical disquisition as to the relative priority as between these conditions. Further, it may be that the cause of one particular crime may be biological (for example, the crime committed by an insane criminal) while the cause of another may be social (for example, the crime committed by a person through extreme poverty). And, again, in some cases the crime may be, at the first instance, induced by one set of factors and then helped to develop by another set of factors. It is necessary, therefore, to study all the conditions that may appear to have a bearing on the point at issue and to propose remedial measures adapted to the various conditions. It is this view-point that has given rise to the third school the Bio-sociological school of criminologists, headed by Enrico Ferri and Baron Garofalo, countrymen and disciples of Lombroso. Garofalo begins his 'Criminology' by pointing out the inadequacy of the physical and anthropologic notion of the criminal and demands a sociologic notion of crime. He finally arrives at the conception of what he calls the "natural crime" which he describes as "an offence against the fundamental altruistic sentiments of pity and probity in the average measure possessed by a given social group (*v*). To Enrico Ferri, however, is due the transformation of criminal jurisprudence into sociologic science (*w*). He bases the origin and nature of delin-

Fundamental error in the basic principle of both the schools.

Cause of crime a combination of several conditions, social, psychic and biological.

The biosociological school of Ferri and Garofalo.

Garofalo's demand for a sociologic notion of crime.

(*v*) Garofalo's 'Criminology' pp. 3-4, 54-55.

(*w*) De Quiros' "Modern Theories of Criminality" p. 20.

mental ideas of morality. This led Lombroso himself to modify his theory by the addition of two other factors as determinants of crime, namely, *moral insanity* and *epilepsy* (*s*). The basic idea of the Lombrosian theory seems to be that a criminal, properly speaking, like a poet, is born and not made. Whatever element of truth the theory may contain, it could not be accepted as it was. It has been pointed out with great force that although a person might be born degenerate still it requires a social surrounding to develop that tendency of degeneracy. Cases also are not rare in which a person born of honest parents, brought up in a decent surrounding, lapses into criminality late in his life on account of evil surroundings and economic conditions (*t*). Dr. Bonger in the preface to his great work "Crime and Economic Conditions" makes this pregnant observation: "There was a time in Europe when it was thought with Lombroso that crime was rooted in man himself; the progress of sociology has shown more and more clearly that the roots are found outside man, in society. There is nothing more variable than man That heredity plays a great part on the scene of criminality has never been proved!" Have the advocates of "sterilization" (*u*), one should be inclined to ask, never heard of Australia, where a considerable number of the inhabitants are descended from the worst of criminals, and where yet the rate of criminality is low? The army of prostitution has been for a great many centuries by far more sterile than the army of criminals can ever be made, and yet prostitution is not decreased; the increase and decrease of this phenomenon is ruled by social factors." It has been further asserted by Sociologists like Colajanni, Loria and others that the social factors are always the real and first causes of crime in as much as it is from them that individual,—organic and psychic—anomalies and degeneration are perpetuated by hereditary transmission. This however, is the extreme view of the French Sociological School and might be regarded as a reaction against extreme individualistic view of Dr. Lombroso and his followers in England, American and Germany. The importance of this difference of opinion, from a practical point of view, however, is very great, be-

Moral insanity and epilepsy as determinants of crimes.

Social and economic factors.

The schools of socialists and sociologists.

(*s*) Dr. Maudsley says that the most diverse cases of homicidal impulses are connected with epilepsy.

(*t*) We will see hereafter, how Ferri attempts to meet all these objections. See also a very interesting article "Heredity and Environment" (Journal of Criminology, Vol. II, p. 123) bearing upon the influence of these two factors on criminality.

(*u*) In America, this is one of the most debated question of the day. There are some well written articles for and against this practice of "Sterilization" in the fourth and fifth Volumes of the Journal of Criminology.

Lombroso's description of the criminal man.

prominence of the superciliary arches 58·2 per cent., retreating forehead 28 per cent, prominence of occipital protuberance 16·6 per cent., etc., etc." This study of the physical and anatomical characteristics of the criminal gave the first impetus, so to say, to the Science of Criminology, but this, in its turn, came to be supplemented and modified by a study of the psychic, economic and sociologic conditions of criminality. The pioneers in the field of a new science or the propounders of a new theory, generally happen to be enthusiasts and they often let their theories run beyond facts and phenomena. This was to a great extent true of Lombroso—as it was true of another pioneer in a different field, Lamarck. Lombroso, at first, thought that the anthropological data were quite sufficient to solve the problems of crime and criminality. In his later writings, of course, he somewhat modified his first theory and recognised the importance of other factors—psychic, economic and sociological as determinants of crime. But with all this change, it may be affirmed that the anatomic and anthropologic factors continued to characterise the Lombrosian theory of Crime. But this new theory gave rise to heated controversies all over Europe and specially in France where scientists came forward to demonstrate that crime was due, not so much to atavism as to economic and social conditions of the criminal. It was even asserted that the anatomic features, upon which Lombroso so much relied were not the true index of a man's criminality. This gave rise to the sociological and the socialistic schools called the French school, on account of the preponderance of French thinkers on this side, headed by Tarde and Calajanni. The battles between the Italian (*p*) and the French schools were fought on the arena of the International Congresses of Criminal Anthropology in which the greatest thinkers of Europe participated. I do not propose to discuss in course of this article the merits and defects of either school all that need be done here is just to indicate the lines of the growth and development of Criminological Science. The theory of atavism (*q*), which means "the tendency of living beings to return to a distant type from which intermediate generations have made them deviate" (*r*), advanced by Lombroso to explain the phenomenon of criminality, was found insufficient, as it was pointed out that the savage-type was not wholly criminal nor did it altogether lack the funda-

Defects of Lombroso's views.

Modifications of Lombroso's earlier views by inclusion of factors other than anthropologic.

The French school of criminologists.

International Congresses of Criminal Anthropology.

(*p*) Ferri, in his 'Criminal Sociology' (pp. 28-29) denies that this is the viewpoint of the Italian school.

(*q*) We may compare Darwin's view of atavism with that of Dr. Lombroso.

(*r*) De Quiroz' 'Modern Theories of Criminality' p. 13.

machine like) and to the criminal as affected by those causes. The science of criminology can thus be studied in two broad divisions—(1) Study of the criminal and nature of crime and its determinants and (2) Individualisation of punishment to realise the purpose in punishment—the "Zweck-strafe" as the Germans would call it.

The problems of criminology.

The science of criminology is of recent origin, in fact, one may say without fear of contradiction, that it definitely originated in the seventies of the last century with the writings of the Italian Doctor Cesare Lombroso, who first wrote on "The criminal, in relation to Anthropology, Jurisprudence and Psychiatry," which drew the attention of scientists, sociologists and jurists to the criminal as an object of study. But at the same time, it must be noted, that history was slowly but surely, preparing the way for this new-born science. History, like nature, it is said, never advances *per saltum*, and in this case, there were several factors at work which gradually moulded and shaped human thought and directed it towards the study of the criminal man and the causes of crime. The study of the criminal dates back to the days of Lavater and Gall—the latter part of the eighteenth and the earlier part of the nineteenth centuries and the results of their researches were embodied in the pseudo-science of Phrenology, which professes to be able to read human character from the conformations of the skull. The pseudo-sciences like Phrenology and Physiognomy (which professes to be able to read human soul from the face) might be regarded as the direct ancestors in the ascending line of the modern Criminal Science just as Astrology and Alchemy might be regarded as precursors of the sciences of Astronomy and Chemistry. The underlying idea of Phrenology—an idea shared by the earlier criminologists such as Lombroso and others—is that a criminal, in so far as his physical and anatomical characteristics are concerned, stands in a class apart from the class of normal human beings. Desquiros (*o*) quotes from Lauvergne, a fervent disciple of Gall, the description he gives of the physical features of the cold-blooded assasins which runs thus. "They possess marked protuberance and a peculiar face stamped by the seal of a brutal and impassible instinct. Their heads are large and receding with notable lateral protuberances, enormous jaws and masticatory muscles always in motion." It is interesting to note how Dr. Lombroso's first conception of the true criminal as an atavistic phenomenon closely resembles the dercription given above. Thus, in his "Criminal man" in giving the result of his study of 383 skulls of criminals he speaks of "the great

Beginning of the science of Criminology.

The study of the criminal dates back to days of Lavater and Gall.

Phrenology and physiognomy precursors of the modern criminal science.

Criminal standing in a class apart.

(*o*) Modern Theories of Criminality p. 3.

Law, intimately bound up with other sciences.

Criminal Law is a factor in the march of world-history (*l*) and world evolution and that as such it is intimately bound up with sciences that deal with humanity and human affairs, such as Sociology, Psychology, Physiology and Anthropology—our study will, at best, be fragmentary and emperical. Law must free itself from this petty empericism if it wants a place in universal Philosophy, and if it wants to keep pace with the advancing culture of the world. "Only when based on this foundation" says one of the greatest of the present day jurists "can the requirements of the law be recognised as the requirements of the advancing culture which the law is to serve, and only in this way can the true aim of the law be known for what it is" (*m*).

Criminology, as the science of the criminal man.

begins with a study of the criminal to ascertain the origin and nature of criminality.

This attempt, then, to make Criminal Law a Science is the starting-point of modern Criminology—The Science of the criminal man and of crimes. The criminologist must begin, then, by studying the criminal, just as the medical man studies the patient. He must try and understand the origin and nature of crime, just as the physician studies the origin and nature of a disease and then, like the physician, again, he must try and find out a specific remedy for the specific crime (n). He must begin by discarding the old, although still dominant thought that a crime is caused by the inscrutable moral freewill of the agent doing or abstaining from the crime, just as it chooses, absolutely free, at any moment of time, to commit or not to commit the crime and therefore, in itself, and by itself, the sole determining factor of his criminal act. But modern science, here as in medicine (in which only two centuries or so ago the cause of disease was thought to be the inscrutable will of God) realises that crime (like disease) has natural (which includes physical, physiological psychological and sociological) causes or determinants. It is not necessary to assert, of course, that criminality is a disease, as has been asserted by some criminogists but what is necessary to premise is that criminality has its natural determinants which go to produce it in a given case. The problem of criminology, therefore, comes to this that we should find out those specific determinants of each particular crime of a given criminal and should ascertain specific remedies adapted to the specific causes (because, as I have stated before, penal and remedical treatment cannot be indiscriminate or

Natural determinants of crime.

(*l*) Ihering in his "Law as a means to an end" (Chapter on Criminal Law) brings out this point very clearly.

(*m*) Kohler's Philosophy of Law p. 27.

(*n*) See an article by Dr. Healy "Present day aims and methods in studying the offender" Journal of Criminology Vol. IV p. 204.

goes down the plane of criminality, the more he loses his freedom and his criminality tends to become more and more a matter of habit, but should he, on that account, be less punishable than any first offender like Victor Hugo's Jean Valjean or Dostoieffsky's Raskolnikoff? It would be preposterous even to advance a proposition like this. Then there are what are known as the Criminal Tribes in India, for example the Dusadhs, the Sonars, the Minak, etc., (j) who are taught to commit crimes from their very childhood, nay, who perhaps imbibe criminal tendencies with their mother's milk. What sort of freedom or responsibility can we expect from an individual of these tribes? It is all very well, of course, to talk about a man's being the architect of his own fortune and of his being able to mould and determine his surrounding circumstances, but the incontrovertible fact remains that a man is the meeting-point—the point of intersection, as, Tarde calls him—of an overwhelming number of physical, physiological and social factors, which, to a great extent, condition and colour his life. Further, as Salilles puts it, "the conception of freedom is the same as that of a first cause." But might it not be very pertinently asked as to whether, we, ever in the practical administration of justice, pause to consider if a person is the primary or the secondary cause of his act, or for the matter of that do we ever in our practical life, recognise any distinction between a primary and a secondary cause? If not, it must be said that this criterion of freedom as proposed by the classical school, cannot furnish us with a safe or reliable guide in the practical working of Criminal Law.

inapplicable to cases of habitual criminals and to criminal tribes.

Freedom and responsibity unreliable tests.

There is another consideration which touched the general aspect of the existing system of Criminal Law to which some reference should be made here. Criminal Law or Jurisprudence has neither been developed nor studied as a science. It has always been tacitly assumed that it absolutely depends upon the will of the sovereign authority and all that one may be required to know of Criminal Law will be found either in the statute books, or in the common law of the land. It has been regarded, to put it shortly, as a water-tight compartment having no relation to any other department of thought or knowledge. The fallacy of such a position has been demonstrated over and over again by philosophers like Aristotle, and Dr. Kohler and others, (k). Unless and until one recognises that the system of

Criminal Law as being dependent upon sovereign will.

Fallacy of this position.

(j) Manual of criminal cases by F. G. Daly.

(k) Aristotle in his Nicomachean Ethics and Dr. Kohler in his Philosophy of Law have made vigorous protests against the study of law as a detached branch of knowledge.

Idea of proportionality between an offence and its punishment.

results by means of individual experiments, because, we know that no experiment was ever attempted. They are obliged, therefore, to fall back upon some such vague and indefinite notion of a metaphysical proportionality between the offence and punishment. But we are all aware as to how this notion of proportionality and consequently the idea of the adequacy of a particular punishment for a particular crime, varies from age to age, from country to country, nay, even from individual to individual. And it is surely inconceivable that such an indefinite and variable notion can furnish us with a practical guide in the realm of one of the most serious of human problems! It was not very many decades ago, that theft and poaching were punished with death in England. One now calls this barbarous, but, indeed, who can say whether it was proper or not. Surely, it is quite possible to imagine cases of theft or cases of rape which are, in no way, less heinous than cases of murder. Why, then, should the punishment for theft and rape, be *in all cases* and *necessarily*, less than that in a case of murder? There is needed, no *necessary* or *causal* connection between murder and hanging on the one hand and theft and imprisonment on the other, and so long as this necessary connection is not established we cannot say that this metaphysical demand for proportionality is fulfilled. Further it will be observed, that this idea of proportionality is not even absolute in the case of the same individual, there is always the difference between the *meum* and *tuum* and a punishment which I shall consider adequate in my case, will be considered quite inadequate in the case of my neighbour. In fact the idea of this axiomatic relation between crime and punishment appears only in the case of my neighbour; while in my case, if I repent, I would think that society has no right to punish me, and if it does punish me the punishment is unjust and unmerited (*f*).

Indefinite vague and variable.

and hence safe guide.

Demand for proportionality not met so long as no necessary connection is established between crime and punishment

The idea of proportionality is not even absolute in the case of the same individual.

Further, there is a metaphysical or ethical notion which is generally set up as a criterion of the measure (not of the kind, be it remembered) of punishment and that is, as I have mentioned above, the degree of freedom and responsibility of the individual criminal. It is not possible to deny that, in some cases, this furnishes us with a valuable criterion, but to accept this as a universal test for all cases of criminality is surely misleading. The importance of the subject demands a separate treatment and I do not intend to anticipate my arguments here. All that is necessary to point out in this connection is that it would lead us to an unanswerable paradox. It is a well-known fact that the lower a person

Freedom and responsibility as criteria of the measure of punishment,

leading to a paradox.

(*f*) See Holmes, "Common Law" p. 45.

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PRINCIPLES OF CRIMINOLOGY.—(*Continued.*)

Criminal Law and origin of Criminology.

No attempt at individualisation.

A further, and perhaps, the most serious, objection that may be urged against the classical system is that it does not follow any scientific method in awarding punishments and that there is no attempt—apart from what is attempted, in a small measure, by leaving a very limited discretion to the judges and the jury—at an individualisation. This lack of method has resulted in an artificial and abstract empericism. Baron Garofalo puts this point very forcibly and I need make no apology for quoting the following few lines from him (*k*): "From the earliest period of my legal studies, the question has begun to present itself to my mind: How has the law-maker arrived at an exact knowledge of the kind and degree of punishment appropriate to each of the various criminal offences? By what means has he reached the conviction, for example that five years in the penitentiary is the proper punishment for one kind of larceny, while, for another, two years of a milder form of imprisonment will suffice? What steps has he taken to weigh this or that aggravating or extenuating circumstance with such exactness as to warrant an increase or diminution in the punishment of six months, one year, five years, ten years as the case may be? Where has he found his criterion, his thread of guidance in this labyrinth?" It is indeed this question which has struck the scientists of the present day and has induced them to look at the system of penal law from a point of view from which it was never looked at before. This has been the starting point of the modern science of Criminology. What answer, let us now see, it is possible for the jurists of the classical school, to return to the question propounded by Baron Garofalo. They cannot honestly say that they have arrived at the

Artificial empericism of the classical system.

Starting point of criminology.

(*k*) 'Criminology.' Introduction, p. XXXII.

convictions reach the rather high figures of 957 and 77 respectively. In the year 1914 the percentage of recidivation was higher still *i.e.*, out of a total of 9,455 persons convicted, we have 1,518 recidivists *i.e.*, 16 per cent. In the same Report, in Statement I one finds that almost all the crimes are practically on the increase; beginning with 294 cases of murder in 1911, the figures rises to 440 in 1916, cases of theft in 1911 were 18976 while they rose to 25,833 in 1916. It is unnecessary to comment on the facts and figures given above; they speak for themselves and they form an indictment against the system of remedial and penal measures as adopted by the classical school.

Failure of the classical system.

From the foregoing facts and figures it is clearly established that the classical system, in so far as it proposes to prevent crimes and reform criminals, has been an utter failure. All that the system can claim is that it has regulated private vengeance by transferring the authority of taking revenge from the injured party to the State.

Sitaram Banerjee, M.A., B.L.

To be continued.

REVIEW.

The Hindu Disposition of Property Act by Kshitish Chandra Chakrabarti, M.A., B.L., Published by Butterworth & Co., (India) Ltd., Calcutta; Price Rs. 2-8.—We have received a copy of the above publication which is an annotated edition of Act XV of 1916. The Act is one of great importance so far as transfer of property by Hindus in favour of unborn persons is concerned and Mr. Chakrabarti has certainly done a great service to the profession in bringing about this treatise. We are glad to find that the book is self-contained in as much as all the necessary portions of the Transfer of Property Act and Succession Act are incorporated in the book. The law of perpetuity in British India has been dealt with in an interesting way in the introduction to the book. We have no hesitation to commend this publication to the various branches of the profession.

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is based upon its duty to protect the individual (*c*) and surely it is the height of inequity to insist upon the right without fulfilling the duty. It will be urged, perhaps, that the classical school does not altogether ignore the reformative view of punishment and that it attempts reformation whereever that is possible. To that our answer will be that facts and figures give a lie direct to this assertion. In almost every country in Europe the number of recidivists is continually on the increase (*d*). In 1900 as the eminent criminologist Garofalo points out in his "Criminology" (*e*) the recidivists in the Italian penitentiaries constituted 55% of the total number of inmates, "proving that the number of recidivations, which has long been the subject of serious concern, still continues to grow larger from year to year." In France, before 1885, the situation was the same. I take the following from Cazot's Statistics as quoted by Garofalo; "The number of recidivists twice convicted in course of one year increased from 6851 in 1878 to 7556 in 1879, the number of those convicted at least three times from 2045 to 2237 during the same period (*f*). In Belgium from 1854 to 1860, the proportion of recidivists in the penitentiaries was 70%. In Sweden, in the year 1868 the percentage of recidivism reached the remarkable figure of 75% (*g*). In the "Report on the Police Administration in the Presidency of Bengal in India for year 1915 in Statement L, page XXXII, it will be seen that out of 11,807 persons convicted during the year, 1724 persons were judicially found to have been previously convicted (*i.e.*, 14·3)%, while out of these recidivists there were 943 persons against whom one previous conviction was proved, two previous convictions against 228, three against 204, four against 111, five against 67 and more than five against 71 In the Report for 1916, out of 11,222 persons convicted, we find 1,709 recidivists (*i.e*, 15·2 per cent), while the number of persons having one previous conviction and the number of persons having more than five previous

Statistics to show an increase of crime and recidivism.

In Europe.

In India.

(*c*) With regard to the State's authority to punish crimes, see an interesting article by Dr. Hoffding in the Journal of Criminology Vol. II, p. 691.

(*d*) There are some very forcible observations of Judge De Courcy on the failure of the existing system of criminal law from economic and other points of view.

(*e*) Baron Garofalo's 'Criminology' pp 210-211.

(*f*) "The official Journal" of 13th March, 1883 contains the following significant confession, "Half of discharged convicts commit new felonies or misdemeanours almost immediately after leaving prison."

(*g*) We find from an article on "Increase of crime in England" (Journal of criminology Vol. II, p. 138) that since the year 1899 crime is ever on the increase in England. The United States of America are in a similar predicament. See Journal o Criminology Vol. VI, p. 754.

ignored. If it were possible, indeed, to solve human and social problems by treating human beings as algebraic quantities and their acts as abstractions—misery and unhappiness would have been things unknown in this world, but unfortunately, that cannot be It is a matter of common experience that on account of this impersonal —or shall we say, inhuman?—system, really honest men like Jean Valjean of Hugo's 'Les miserables' are turned into criminals by being branded with the infamy of prison life and being herded together in the same common cells with hardened rogues and felons, while scoundrels, who deserve nothing short of a total elimination, escape with a punishment which is no punishment to them (*a*) It is an admitted psychological fact that once a person feels himself as beyond the pale of decent society, he has no scruples to go further down and surely many a really honest man must have felt like that after coming out of the prison, while it has been proved by facts, beyond doubt, that many a criminal commit crime in order that they may be sent to prison, for that is their haven of peace and rest (*b*) This is the result of the equality of treatment of which our modern Criminal Law boasts!

(iv) Honest men turned into real criminals.

I, further, urge that the system of punishment of the classical school is not only illogical and mischievous it is positively unjust and unfair. As I have indicated above the delinquent himself is a unit of the social group and he is entitled to be treated as such. If he is made to go out of society, it is as much a loss to him as to the society. From the criminal's point of view it may be demanded that society should give him a chance and try to reform him. He might have committed a crime but at the same time he may not be a bad man, and given proper facilities and opportunities, he might have been a useful member of the society. The criminal demands this opportunity and it is only fair that society should meet his demand. But alas! the criminal pleads and demands in vain—he asks for bread and society gives him stone and the impersonal, soulless system of law insists upon treating him as an outcaste and a pariah with the inevitable result that he reacts upon the social system as only a criminal can react. After all, society's right to punish

[v] Classical system of punishment unjust in as much as it ignores the criminal's stand-point.

(*a*) See an article "Treatment of Crime—past, present and future," Journal of Criminology, Vol III, p. 376.

(*b*) A Sicilian song on prison-life quoted by Dr. Lombroso in his "Crime. Its causes and remedies" throws an interesting light on this point—"only here will you find friends and brothers, money, good things to eat and merry ease; outside, enemies ever surround you; work you must or perish of starvation."

Punishments" (*w*) published in 1764, condemns the power left to the judges in determining the punishment of criminals. He urges that no punishment should be greater than what the crime warrants and that all men should be equal in the eyes of law. Punishment should be determined entirely by the character of the crime committed, regardless of the personality of the criminal. He goes so far as to say that it makes no difference whatever as to whether a criminal is a recidivist or not and that it does not, in any way, increase the gravity of a crime, simply because it happens to be the second or the third crime committed by the same individual (*x*). In either case the injury inflicted upon the society is the same and therefore it is only fair and just that society should avenge it and react upon it in the same manner. In illustrating his point, Beccaria asks whether it would make any difference as between two brothers who have been robbed by two different theives one of whom happens to be a first offender and the other a recidivist. If not what right have we to mete out two different punishments to the two theives? At the first blush, the position would seem to be a quite logical one, but its defect lies in its extreme "logicism" (*y*). Law is pre-eminently a social institution dealing with living and pulsating human beings of an almost infinite variety of types and in order to be just, it must be such as can be adapted to the multifarious view points that arise in course of human transactions. The rigour or leniency of law arising out of its universality will have to be abated or counteracted by practical considerations (*z*). To insist upon the absolute universality and impersonality of law is like insisting upon putting things of all possible shapes into a round hole. In point of fact, this purely judicial conception of punishment and its application has resulted in a view of the criminal act as a pure abstraction—as a sort of algebraic quantity independent of the personality of the delinquent. The jurists of the classical school conveniently forget that the offender himself is as much a unit of the society as the injured party (be it an individual or the society itself) and as such his interests cannot be altogether

Beccaria's view.

(ii) Rigour arising out of the universality and impersonality of law.

(iii) Criminal act treated as pure abstraction.

(*w*) Partly translated into English by Farrer.

(*x*) For principles underlying the awarding of punishment for a second offence see *People* v. *Carlesi*, 139, *N. Y. supp.* 309.

(*y*) For an excellent critical estimate of Beccaria's doctrine, I would refer to Von Bar's History of Continental Criminal Law (Translated by T. S. Bell) pp. 414, 415.

(*z*) One might call this the application of equitable principles to the administration of Criminal Law.

is a matter of common experience that a man's conduct may be most "blameworthy" but at the same time, it may not be punishable in law. So, in order to be of any practical value, the subjective standard of "blame-worthiness" must fall back upon the objective standard of law: As to Kant's "categorical imperative" as basis for law, it is only necessary to observe that it is too impersonal, formal and artificial, to serve any useful purpose in the practical field of law and administration of justice, If it means anything, it must, mean the absolute command of the sovereign authority, that is, law as understood by Austin and other English jurists. We see, then, that as between the subjective or idealistic school and the objective or common sense schools of law there is no difference except in the metaphysical language which the former chooses to employ. One would, therefore, be justified in treating the two schools of opinion under one common designation of the "classical school" and the objections which might be urged against the latter will apply equally to the former.

The classical school.

Three outstanding features of classical school.

The three outstanding features of the classical school of Criminal Law, then, are—(*i*) repression of the criminal, because he has comitted an act deleterious to society, (*ii*) an impersonal and abstract manner of dealing with criminals coming within the same artificial category without any attempt at an individualisation of punishment (*u*), and (*iii*) degree of freedom and responsibility of the delinquent as a criterion of his criminality. Time has now come to take stock in order to determine what the classical school has achieved towards the realisation of its purpose (the defence and preservation of society) and what it has not been able to achieve and why it has failed to achieve that.

Objection to the views of the classical school (i) it ignores the subjective personality of the delinquent.

The first and the fundamental objection against the classical school is that it takes into account only the *objective fact of crime* and ignores altogether the *subjective personality* of the criminal (*v*). One of the greatest advocates of the classical school, the distinguished Italian jurist, Beccaria in his work "Crimes and

(*u*) We will see, hereafter, as to how individualisation was to some extent, attempted by the French Code of 1810 by leaving some discretion to the judge in the matter of awarding punishments. In England, this is done by means of the jury system of trial.

(*v*) In America, at the present day, there are some judges who award punishments with reference to the physical organisation and the state of mind of the accused persons. See *Welty* v. *State, Ind. 108 N. E. 73*, we might compare with this the observations of Lord Watson in *King* v. *Henderson* (*1898*) *A. C. p. 735*, with regard to the importance of "motive" in certain classes of criminal cases.

the objective gravity of crimes (*p*). Among the principal advocates of this school of thought are Bentham (*q*) and Sir James Fitz James Stephen in England and Dr. Holmes in America. The basic principle of this school appears to be, that since desire for vengeance is innate in human nature and that no legislation is possible upon an ideal and imaginary state of things which does not as a matter of fact exist, the law not only wisely does, but that it ought to make the gratification of revenge an object. Sir James Stephen, in his usual pithy and direct manner says "The Criminal Law stands to the passion of revenge in much the same relation as marriage to sexual appetite" (*r*). In spite of the avowal by Sir. James, it may be said that the common sense school does not ignore but rather accepts the preventive and the deterrent view of punishment (*s*).

Bentham, Stephen and Holmes—advocates of the objective view.

Gratification of revenge an object of criminal law.

Common sense school does not ignore the preventive view of punishment.

There is to my mind, no fundamental difference between the two schools of opinion. The difference is practically a mere verbal one. What do Kant's "blameworthiness of conduct" and "categorical imperative" come to, after all ? If we look upon "blame-worthiness of conduct" as an abstract something (*t*), it cannot furnish us with any practical guide for punishment ; on the other hand, it may be urged that "blameworthiness of conduct' can only be judged from the objective act itself, in which case Kant's doctrine becomes identical with the common senses and objective view of crimes. Further, the criterion of punishment, according to both the schools, appears to be the same, namely, the degree of responsibility and freedom of the delinquent and the gravity of the offence. It must also be borne in mind that law, as it is, can, at most, demand from each individual a conformity to the external standard which it lays down and to try and foist an artificial subjective standard upon it must not only be futile but mischievous as it would unnecessarily clog the machinery for administration of justice. It

No fundamental difference between the two schools.

Kant's view criticised.

(*p*) These various points of view of criminal law are dealt with in an article by Mr. Courtney Kenney in the January number of Law Quarterly Review (1918). The article is a critical estimate of Von Bar's. "A History of Continental Criminal Law."

(*q*) Bentham's Theory of Legislation' p. 325.

(*r*) "General view of the Criminal Law of England," p. 99.

(*s*) See Holmes, "Common Law" pp 46-47.

(*t*) But may not Kant's view mean that we are to judge the personality and perversity of the delinquent ? In that case, it would approach the view of the modern criminologists. For an excellent, though brief, criticism of Kant's position, see Von Bar's "History of Continental Criminal Law," pp. 433-424.

no longer looked upon as the innocuous act of an individual which could be purified by payment of money (*l*) ; it came to be looked upon as the act of a person who is a danger and a menace to the community and who, therefore, must be chained up or got rid of, in the interest of the society. This was the key-note of the medieval Criminal Law which continues to exist to the present day. The purpose of Criminal Law is to defend society and that purpose must be strictly realised no matter what happens to individual criminals (*m*). They are the diseased organs of the society and in accordance with the heroic mode of treatment then prevalent the diseased organs must be amputated without any mercy or consideration. Such then was the criminal—a moral leper to be absolutely shunned at all costs. There was no question of any attempt to reform the criminal ; like a sinner he is past all redemption and like a sinner he must be condemned to an eternal incarceration The object of punishment was punishment itself. This viewpoint found its logical culmination in the formalistic metaphysics of Kant and Hegel : the former would refuse to punish a criminal for any ulterior object, because according to him, a man must be treated as an end unto himself (*n*), while the latter would put his theory of punishment in his well-known quasi-mathematical formula that wrong, being the negation of right, punishment is the negation of that negation, or retribution. In this view, then, the punishment must be equal, in the sense of being proportionate to the crime, because its only function is to destroy it (*o*).

Point of view.

Criminal treated as a moral leper.

Kantian and Hegelian points of view.

Proportionality between Crime and Punishment.

The medieval, or the classical theory as it has been called, again, has given rise to two different schools of opinion—the subjective or the idealistic School and the objective or the common-sense school. The former is so called because it holds that punishment is not based upon any external standard but upon the blame-worthiness of the delinquent's conduct (Kant) ; while the letter, with a candour which verges almost on indelicacy, would assert that the object of punishment is retributive, that there is a sort of automatic and axiomatic connection between crime and punishment and that punishments should on that account, be always proportioned to

The Subjective and and the objective Schools of Criminal Law.

(*l*) Lecky's "History of European Morals" (R. P. A.) Vol. II p. 90.

(*m*) See an article "Criminal and the law" in Journal of Criminology Vol. II, p. 68 were the writer discusses the purpose of law in regard to criminals from various points of view.

(*n*) Kant's 'Philosophy of law, (Translation by Hastie) pp. 195-196.

(*o*) Hegel's "Philosophy of Right" (Translation by Sterret) Dr. Kohler seem to follow Hegel. See Kohler's Philosophy of Law p. 268,

cure ; or on his failure, both full damages *and a fine* to the same amount." In cases of simple hurt, the fine would vary from a hundred *panas* to six *nishcas*, while in cases of grievous hurt, the punishment prescribed was banishment. In cases of theft, according to the value of the articles stolen, the punishments would vary from a simple fine to the amputation of a limb or even capital punishment. There was another factor which contributed largely to the moulding of the idea of public punishment and that is the factor of religious sentiment, as I have observed above. The offence came to be looked upon, not merely as an invasion of the social order, but as an infringement of the religious order of the community and the infliction of punishment became a sort of a religious ceremony. It would be solemnised by formalities, sanctioned by the religious laws with one particular ceremony for the trial and the sentence and another for the execution of that sentence (*j*). In ancient Hindu Law, we find how a King is enjoined to "decide the affairs of the litigant parties," being pure in mind, holding forth his right arm, without any ostentation in dress or ornament and we read, further as to how when the king does justice, "a sixth part of the reward for virtuous deeds, performed by the whole people, belongs to him" but when he does injustice or does not protect his subjects, "a sixth part of their inequity lights on him." The influence which the religious sentiments have exercised upon the moulding of criminal law would also explain how the ecclesiastical Courts of England, came to assume jurisdiction in certain important classes of criminal cases. Sir Henry Maine in his 'Ancient Law' (*k*) quotes from the writings of King Alfred to show how the origin of criminal jurisdiction can be attributed partly to the authority of the church and partly to the *witan*. It may be further observed, in passing, that the solemnity and grandeur which attach to judicial trials and proccesses of the modern time are but relics of the past. To a Hindu or Mahomedan, the association of law with religion is quite an admitted fact—the former seeks his law in his "Dharma Sastras," the latter in his "Quoran."

Religious sentiment in the moulding of Criminal law.

In ancient Rome.

In ancient India.

In England.

I say, therefore, that all these factors moulded the criminal law of the people of the middle ages in Europe and changed their perspective with regard to the crime and the criminal. A crime was

Medieval Criminal Law.

(j) See Gummidge's "The legal procedure of Cicero's Time" p. 472 and pp. 504-516. Also, Von Bar's History of Continental Criminal Law. pp. 9-10. Mommsen observes that every death penalty was originally, in Rome, the offering up a victim as a sacrifice.

(*k*) Ancient Law p. 353.

Idea of punishment in primitive system of law.

find in Roman Law that a person who has committed an offence against the state would be dealt with very much in the same manner as a person accused of treason or sedition would be dealt with to-day (*g*). But this was only an exceptional case and it in no way militates against the views advanced above.

Gradual change in ideas in Europe.

But all this was gradually changed as socialistic and communistic ideas began to grow and spread. In Europe, the system of the Draconian Laws and Plato's Communistic Philosophy in which the individual was regarded as existing solely for the well-being of that cruel and truthless God, society, which were lying dormant so long, came to be revived through the austere philosophy of the scholastic fathers and which, in England, culminated in Puritanism. The culpability of the offender was made to depend, not so much upon his having injured another person as upon his having sinned against the social order and the ten commandments. The State, gradually came to assume the position and function of the injured individual and this fiction of law was fully maintained in the idea of the State as the sole prosecutor in criminal cases. It must not be supposed, however, that this change in the view-point was brought about suddenly and abruptly. The conception of public right gradually gained ground even where the *wergild* and external punishment prevailed. For example, as Professor Salilles observes, "the sense of indignation and public condemnation, which is an early index of the sentiment of culpability, appears with reference to theft and there serves as a needed protection. This is true particularly of covert theft, accomplished by a cowardly ruse, and to other situations no longer approved among primitive peoples, whose customs, however, brutal, are yet compatible with a fairly developed morality. The conception of a public penalty appears wherever the prevailing system sanctions the division of the fine between the victim and the community" (*h*) This is very well illustrated both in the ancient Hindu Law and the early English Law. Over and above the *Bot* which the offender was required to pay to the injured person as compensation, he was made to pay also the *wite*, a fine to the king, as having disturbed the peace of his realm. Thus, we find in the Manu Smriti (*i*) "In all cases of hurting a limb, wounding or fetching blood, the assailant shall pay the expense of a perfect

Payment of fine to the State.

(*g*) See Hunter's 'Roman Law' (Second Edition) pp. 1065-1066. See also Von Bar's History of Continental Criminal Law, p. 42.

(*h*) Individualisation of punishment' (Modern Criminal Science Series) p. 26.

(*i*) Jones' 'Institutes' p. 173.

peace (*c*). Writing of the early English Criminal Law, Sir James Fitz James Stephen says "In the earliest period of English History crimes seem to have been regarded as private wrongs, revenged rather than punished by those who were injured by them, first by private war, afterwards by summary execution, and then, by a public administration of justice, slowly organised in such a way as to bear many traces of the rough system, if so it can be called, which it gradually superseded" (*d*). Thus, in the laws of King Alfred—the Justinian of early English Law—we find that the *Bot*, *i.e.*, the compensation to be paid to the injured party, was fixed according to the nature of the injury inflicted; so the *bot* for the loss of the great toe was twenty shillings, of the second, fifteen shillings, of the middle toe, nine shillings, of the fourth toe six shillings, and of the little toe, five shillings.

Early English criminal law.

The *Bot*.

Although the ancient Hindu legislators were, to some extent aware of the difference between the *crimina* and *delicta*, they could not altogether get beyond the Mosaic Law of private revenge which tacitly recognises a direct proportionality between an offence and its punishment—which, by the way, Holmes characterises as instinctive and ingrained in human nature, so far as the external world —the Non-ego is concerned (*e*). Thus, we read in Manu "with whatever member a lowborn man shall assault or hurt a superior, even that member of his must be slit, or cut more or less in proportion to the injury" (*f*). It will have to be admitted, however, even by the most adverse of critics that the ancient Hindu legislators evolved an almost perfect Code of Criminal Procedure (not that there was much difference between Civil and Criminal Procedure) and a system of definition of offences.

Hindu Criminal Law

From the foregoing observations, it would be clear that in primitive systems of Law, the social factor in the punishment of an offence was almost absent, indeed, in certain cases, the idea of punishing an offender in the sense in which we understand the word, "punishment," was altogether negatived. But it would not be fair or correct to say that in no case was the idea of punishment present, for we

(*c*) Kemble "Anglo Saxons" p. 1-177. See also Von Bar's History of Continental Criminal Law, (Translated by Bell), pp. 60-61.

(*d*) Stephen's "General view of the Criminal Law of England" p. 8.

(*e*) Holmes' Common Law p. 45.

(*f*) Sir William Jones' Institutes of Hindu Law p. 172, Paragraph 279. It would be interesting to compare with this the system of Criminal Law and Procedure in ancient Japan. See an article "History of Japanese Code of Criminal Procedure in Law Quarterly Review Vol. XXX p. 448.

Law, a historical factor, and as such capable of growth and evolution.

Once this fundamental principle is admitted, as indeed, it is bound to be admitted, the conclusion becomes irresistible that Law like every other human institution is not fixed and immutable. It is a historical factor and as such is capable of growth and evolution. The researches of Savigny, Puchta and others have dealt a death blow to the doctrine of *Jus Naturale* so strenuously advocated by Hugo and Grotius. We have now come to realise that every system of Law, as indeed every human institution, has its value. Nothing is useless, nothing is meaningless in the march of the world evolution. Customs, like Polygamy, for instance which, to us appear simply barbarous, had had their day: they had their social and cultural value for the community which gave them birth.

Application of the historical method to the study of Criminal Law.

Applying this historical and comparative method to the study of criminal law, it can be seen that the purpose behind it has been realised by different people in different ages in varying degrees. In the old days although it was vaguely and dimly felt that the community had something to do with crimes and criminals, still the individualistic factor predominated. A crime was looked at from the point of view of the individual injured. This was the basis of the law of Moses—"Eye for eye and tooth for tooth"—the law of private revenge. If the injured person could be placated or his relatives conciliated by payment of blood-money, the community had nothing further to do with the crime or the criminal. The amount of blood-money, again, would depend upon the social rank, and status of the injured person. This is why in the law of the ancient Romans and of the old Germanic tribes we do not notice any difference between crimes and civil wrongs—*crimina* and *delicta*. In those ancient systems, the person injured had to proceed against the wrong-doer by an ordinary civil action and if successful, could only recover money damages. In the commentaries of Gaius, we find that *Furtum* or Theft stands at the head of the list of civil wrongs recognised by Roman Law (*b*). Offences like Assault and Robbery are exclusively treated as Torts and are classed along with Trespass, Libel and Slander All these would give rise to an obligation or *vinculum juris* and would be requited by a payment of money. In the Laws of the Germanic tribes, we find the same peculiarity more distinctly manifest, inasmuch as, a particular sum of money was placed on the life of every freeman according to his rank, and a corresponding sum on every wound that could be inflicted on his person and for nearly every injury that could be done to his civil rights, honour or

Point of view from which a crime was looked at in primitive societies.

Payment of blood money.

No distinction between *crimina* and *delicta*.

Theft, Assault and Robbery treated as civil wrongs.

(*b*) See Sohm's "Institutes of Roman Law" (Translation by Ledlie) p. 417.

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PRINCIPLES OF CRIMINOLOGY.

Criminal Law and origin of Criminology.

I do not propose, in this article, to enter into a detailed or academic discussion about the origin of criminal law. All that need be premised is that criminal law, like any other department of law, or perhaps more than any other department of law, has a purpose in view and a great object to attain. No doubt the beginning of all law may be characterised as unconscious—an automatic reaction of the Society against internal and external injuries. But as law grows and develops we realise that there is a conscious purpose behind it. As Dr. Ihering so forcibly puts it "One legal purpose is produced out of the other with the same necessity with which, according to the Darwinian theory one animal species is developed from the other. And if the world should be created a thousand times as it was once created—after milliards of years the world of law would still bear the same form ; for purpose has the same irresistible force for the creations of will in law as cause has for the formation of matter. Thousands of years may elapse before this compelling force of purpose becomes visible in a particular point in Law—what are a thousand years in comparison with milliards? Law obeys this compulsion willingly or unwillingly. But the compulsion proceeds step by step. Law knows no leaps any more than nature, the antecedent must be there first before the higher can follow : Law knows only one source and that is the practical one of purpose" (*a*).

Purpose in law.

Ihering's view.

(*a*) Ihering's "Law as a means to an end" (Zweck im Recht) page, (preface) *viii, lix.* See also p. 362 where the learned jurist discusses the purpose of Criminal Law. Mr. Roscoe Pound, in a brilliant article, "The end of law as developed in juristic thought" (27 Harvard Law Review, p. 605, 30 Harvard Law Review, p. 201) discusses the question from various points of view.

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ERRATA.

Page 1 line 22 For "chose" read "choose."

Page 209 line 35 For "Per Eundem" read "Per incuriam."

Page 403 line 18 For "Influence" read "Inference."

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———, exercising punitive jurisdiction, gave in the exercise of *quasi* judicial power, decision which cannot be challenged—Misconduct, charge of—Court's power to investigate; *See* Member, expulsion of 247

Trusteeship, sale of, for pecuniary gain, if permissible; *See* Pala, transfer of ... 37

Voluntary statement—Statement made without objection by an insolvent in his examination; *See* Insolvent 209

Waiver—Legality of conviction—Guilty, plea of; *See* Criminal Procedure Code, Sec. 412 122

Warrant—*Munition Board, dealings with—Issue of general search warrant—Criminal Procedure Code (Act V of 1898), Sec. 96 (3).*

Per Chowdhuri, J.: An issue of warrant referring to an enquiry which is "now being made," when there was no enquiry by the Magistrate, is illegal.

An issue of general search warrant referring to all accounts, ledgers, stock books &c., correspondence and documents which may have a bearing on the transactions with the Munition Board, does not come under section 96 clause (3) of the Criminal Procedure Code.

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Talab bakl papers, evidentiary value of ; *See* Rent, suit for 68

——————— papers, when can be taken in evidence under section 32 (2) of the Evidence Act ; *See* Rent, suit for 68

Tenant-at-Will's interest—Market value ; *See* Land acquisition 6

Testimony of person of low morality ; *See* Misdirection 2

Thak map, facts stated in, how proved ; *See* Revenue, settlement of ... 320

Thieves, *gang of, belonging to—Approver, witness—Approver, evidence of—Penal Code (Act XLV of 1860), Sec. 401—Habit—Criminal Procedure Code (Act V of 1898), Sec. 234—More offences than one—Association extending over a long period—Criminal Procedure Code, Sec. 110, conviction under, nature of—Accused, if can be punished for subsequent offence—Evidence of previous conviction, if admissible—Document prepared by parties, if to form part of judgment.*

After the discharge of an accused approver, he is competent to be a witness. His evidence is admissible against other accused persons.

The gist of an offence under section 401 of the Indian Penal Code, is association for the purpose of habitually committing theft or robbery. Habit is to be proved by the aggregate of acts, and though the charge is charge of a single offence, the period over which the association extends is often very long and the longer the period the better it is to establish habit. The question of confining the charges to three in the course of a year, therefore, does not arise and section 234 of the Code of Criminal Procedure has no application.

A conviction under section 110 of the Code of Criminal Procedure has nothing to do with the punishment of an offence. An order under section 110 is only preventive and only binds down the accused to be of good behaviour.

An accused after having once been bound down under section 110 of the Code of Criminal Procedure, can again be punished for being members of a gang associated for the purpose of habitually committing crimes under section 401 of the Indian Penal Code.

Evidence of previous conviction for an offence under the Indian Penal Code, or evidence to show that the accused had been previously bound down under section 118 of the Code of Criminal Procedure, is inadmissible.

Quære : Whether if it can be shown that in a previous case a number of accused were placed on their trial together and convicted, such conviction can be used not for the purpose of proving the conviction or proving bad character but for proving association.

It is generally not desirable to make documents prepared by parties to a case part of a judgment.

Per Duval, J : No one can be convicted on the uncorroborated evidence of an approver. Kasem Ali v. Emperor 192

Title not provable in eye of law, effect of ; *See* Suit, maintainability of ... 463

—— deeds, when purchaser is entitled ; *See* Sale 87

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Suit—(*Contd.*).

Where a ground of attack goes to the root of the matter and arises as it were before the constitution of the domestic forum, a suit is maintainable for the investigation and determination of the controversy according to the procedure prescribed by law.

Where the grounds of attack are completely covered by section 14 of the Indian Arbitration Act, an application is the exclusive and not merely an alternative remedy, the adjudication by a Court other than a Chartered High Court, will be final and not liable to be challenged by way of appeal.

A judgment obtained by consent of counsels acting in Court, in a matter within their authority, cannot form the subject of appeal.

When consent of the Counsels was accorded only when the Judge intimated that he would otherwise decline to entertain the motion, it is not free and fair but constrained and involuntary acquiescence in a mode of trial which the Court has decided to adopt.

A Judge should not interpret statutory law, when it provides for a specific procedure, by reference to decisions pronounced under a different system of procedure.

The plaintiff buyer sought to set aside the award of the arbitrators appointed under the Indian Arbitration Act, on the ground that there was no valid contract between the parties and also imputed fraud to the defendants inasmuch as they claimed damages for refusal to accept goods which they had never offered and were indeed not in a position to deliver. The case for the defendants sellers was that there was a valid contract for the sale of goods, that they delivered the goods according to the contract, and that the plaintiff buyer wrongfully refused to accept the goods and then cancelled the contract. They thereupon gave notice of their intention to resell and actually re-sold the goods three days later. They next applied to the Chamber of Commerce for arbitration and notice was served upon the buyer. The buyer repudiated the authority of the Arbitration Tribunal to deal with the matter, but, under protest, submitted to them his own version of the affair. The buyer also applied to the tribunal for leave to appear by counsel and to tender oral evidence in support of his case. This request, however, was refused, and an award was made against him. The award was forthwith filed in Court and the buyer instituted the present suit :

Held, that the suit was maintainable : **Radha Kissen v. Lukhmi Chand** ... 283

—— by a real purchaser at an auction sale held in 1903 against an assignee of a certified purchaser, if maintainable ; *See* Suit, maintainability of ... 463

—— for redemption, if maintainable—Mortgagee purchasing equity of redemption in execution of his mortgage decree ; *See* Redemption, suit for ... 98

—— to avoid *gunti* tenure—Kabuliat executed by settlement holder in favour of *guntidars*—Settlement, conditions of ; *See* Estoppel 78

Survey map, evidentiary value of ; *See* Revenue, settlement of 320

—— map, facts stated in, how proved ; *See* Revenue, settlement of ... 320

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Suit—(*Contd.*).

is enabled to confer a good title on the transferee, because the real owner is debarred from impeaching the title, not only of the certified purchaser but also of the person who has derived title from him.

The wider restriction embodied in section 66 of the Code of 1908 is not applicable to cases, where the title accrued under the Code of 1882.

Of things that do not appear and things that do not exist, the reckoning in a Court of law is the same; a title which cannot be proved against an opponent in the eye of law, has in point of fact no existence in relation to that individual.

Under section 317 of the Code of Civil Procedure of 1882, the auction purchaser had a title enforceable against the whole world except the certified purchaser. Under section 66 of the Code of 1908, the title of the real owner cannot be enforced against the certified purchaser as also against persons who claim a title derived from the certified purchaser.

Every statute which takes away or impairs a vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already passed, must be deemed retrospective in its operation. The rule that enactments in a statute are generally to be construed to be prospective and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and in the absence of clear words to that effect, a statute will not be construed so as to take away a vested right of action acquired before it was passed:

A sale certificate does not create title but is merely evidence of title: **Promotha Nath Pal Chowdhury v. Mohini Mohan Pal Chowdhury** ... 463

Suit, *maintainability of—Suit for damages—Unlawful interference with the exercise of property rights—Instituting civil action, maliciously and without reasonable and probable cause.*

A person, who unlawfully interferes with the exercise of the property rights of another, commits an act in the nature of trespass to property, and is liable for damages in an action for trespass.

No suit lies for damages against a defendant for maliciously and without reasonable and probable cause, instituting a civil action: **Norendra Nath Koer v. Bhusan Chandra Pal** 495

——, maintainability of—Suit to avoid *gunti* tenure—Kabuliat executed by settlement-holder in favour of *gantidars*—Settlement, conditions of; *See* Estoppel 78

——, *maintainability of—Suit to impeach award made under Indian Arbitration Act—Indian Arbitration Act (IX of 1899) Sec. 14—Ground of attack—Appeal—Judgment by consent of counsels—Consent given under intimidation, nature of—Law, interpretation of.*

When an award under the Indian Arbitration Act, has been made and filed, a party affected thereby can maintain a suit to impeach it on grounds not included within the scope of section 14 of the Indian Arbitration Act.

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Suit—(*Contd.*).

so that the tribunal must in each case look to the particular circumstances:

A suit was brought for recovery of damages for breach of contract in the original side of the Calcutta High Court. The defendant, who was the owner of several collieries in Jheria and in the Raneeganj coal fields situated in the Burdwan district, did not reside within the jurisdiction of the Court. The defendant in 1911 appointed Messrs. H. V. Low & Co. as his managing agents for all his collieries in the Jheria and Raneeganj coal fields. The firm was a private limited liability company, having an office at 12 Dalhousie Square, Calcutta, and acting as managing agents for various concerns. By a memorandum of agreement entered into between the defendant and the company (H. V. Low & Co.) the sole absolute and unfettered control of the management and working of the collieries and of the sale of the output thereof, were conferred on the firm, during the continuance of the agreement:

Held, that the defendant was not liable to be sued on the original side of the High Court, as he could not be said to carry on business in Calcutta, merely because he granted certain rights to Low & Co. under the said agreement.

Under order 49 rule 3 of the Code of Civil Procedure order 7 rule 10 (1) being inapplicable, an order of return of the plaint for presentation to the proper Court, in suits instituted on the original side of the High Court can not be made. **Maharaja Manindra Chandra Nandy Bahadur v. Chandi Charan Banerjee** 327

— *maintainability of—Suit against the assignee of certified purchaser—Title of certified purchaser perfected, when Code of 1882 in force—Civil Procedure Code (Act XIV of 1882), Sec. 317—Civil Procedure Code (Act V of 1908), Sec. 66—Statute, construction of—Sale certificate.*

The rule embodied in section 66 of the Code of Civil Procedure of 1908, is not applicable to an execution purchaser whose title was perfected when section 317 of the Code of Civil Procedure of 1882 was in force. Hence a real purchaser at an auction sale held on the 11th August, 1903, can bring a suit for a declaration of his title by purchase at a time when the Code of 1908 is in force, against an assignee of a certified purchaser, though not against the certified purchaser himself.

Both sections 317 of the Code of 1882 and section 66 of the Code of 1908 operate to place a limitation upon the title of the purchaser, with this difference that the effect of section 66 is to widen the fetter placed upon the title of the purchaser by section 317.

The effect of section 66 of the Code of 1908 is to improve the position of the certified purchaser, and in effect, to confer upon him a power of alienation he would not otherwise enjoy. If the certified purchaser alienated the property, the result, notwithstanding section 317 of the Code of 1882, would be that the title of the alienee could be forthwith defeated by the real owner. Under section 66 of the Code of 1908, the certified purchaser

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Sub-mortgagee—(*Contd.*).

to a sub-mortgagee, but by no means obligatory on him, to frame his suit in such a way as not only to enforce his rights under his own mortgage but to enforce the original mortgage against the mortgagor of his mortgagor: A sub-mortgagee may thus be content to cut off the equity of redemption of his mortgagor, or he may at his choice, by a suit properly framed, cut off the equity of redemption not merely of his mortgagor but also of the mortgagor of his mortgagor.

Where a mortgagee transfers his interest by way of a mortgage his mortgagee, that is, the sub-mortgagee takes it subject to the original mortgagor's right to redeem; consequently, the sub-mortgagee who holds a fragment of the interest of the mortgagee may achieve what the mortgagee might have obtained, namely, to cut off the equity of redemption of the original mortgagor.

When the properties included in the original mortgage are situated in the mofussil and the additional property included in the security granted by the mortgagee is situated in the town of Calcutta, the mortgagee, by the grant of a sub mortgage along with a mortgage of property in the town of Calcutta, is not entitled to have the *forum* altered in relation to the enforcement of the original mortgage. As between the mortgagee and the sub-mortgagee, a suit to enforce the security should be instituted on the Original Side of the High Court. As the sub-mortgagee derives his title from his own mortgagor in respect of the mofussil property, he can do neither more nor less than what his mortgagor could have done towards the original mortgagor. The original mortgagor could be sued by his mortgagee in respect of liabilities arising out of the mortgage transaction only in the mofussil Court. **Krishna Kishore De v. Amar Nath Khetry** ... 272.

Sub-mortgagee, if can proceed against the mortgagor of his mortgagor; *See* Sub-mortgage 272

———, rights of; *See* Sub-mortgage 272

Sub-mortgagee's right to cut off original mortgagor's equity of redemption; *See* Sub-mortgage 272

Suit, forum of—Legal conveyance not executed—Transferee put in possession—Agreement to sell not denied before suit—Specific performance; *See* Transferee, right of 75

——, if maintainable—Ground of attack going to the root of matter—Constitution of domestic forum; *See* Suit, maintainability of 283

——, ***maintainability of—Letters Patent cl. (12)—"Carry on business."—Rights given under agreement—Civil Procedure Code (Act V of 1908), O. 7 R. 10 (1), O. 49 R. 3—Plaint, return of—Suit instituted in the original side of High Court.***

The expression "Carry on business" in clause 12 of the Letters Patent of the Calcutta High Court, is a very elastic one, almost incapable of definition,

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Shebait, appointment of, right of—Endowment of recent date—founder making no provision for the devolution of office ; *See* Shebait 174

——, power of ; *See* Pala, transfer of 37

——, status of : *See* Pala, transfer of 37

Simple mortgagee, if can apply for appointment of reciever ; *See* Reciever ... 385

Specific Relief Act, *Sec.* 53—Mode of granting perpetual injunction, and its effect when granted ; *See* Perpetual Injunction 299

——Sec. 54, scope of ; *See* Perpetual Injunction 259

——Secs. 54, 55, scopes of ; *See* Perpetual Injunction ... 259

Stare decisis—Authority of long established decided cases, is to be maintained, if of universal application ; *See* Occupancy holding 510

Statement, voluntary—Statement made without objection by an insolvent in his examination ; *See* Insolvent 209

——of one accused, if can be taken against another ; *See* Misdirection 80

Statute, when retrospective in operation ; *See* Suit, maintainability of ... 462

——When can take away a vested right of action acquired before it was passed ; *See* Suit, maintainability of 463

Statutory law, interpretation of ; *See* Suit, maintainability of, ... 283

Sub-mortgage—*Leave to sue—Letters patent, cl. (12)—Mortgagor's property situate in the mofussil—Mortgagee's property situate in the town—One suit to realise the sub-mortgagee's dues—Decree ordering sale of mortgagor's property if valid—Sub-mortgagee, rights of—Jurisdiction, want of*—Resjudicata—*Civil Procedure Code (Act V of 1908) section 11.*

Under clause 12 of the Letters Patent, the High Court, in the exercise of its ordinary Original Civil Jurisdiction, is not competent to grant leave to sub-mortgagee to sue for enforcing right of sale of mofussil properties under the mortgage of the original mortgagor. A decree obtained in such suit by the sub-mortgagee after obtaining leave to sue, in so far as it affects properties in the mofussil, is without jurisdiction :

If the decision of the Court is void for want of jurisdiction over the subject matter, it cannot operate as *res judicata* ; in order that a judgment may be conclusive between the parties, the essential pre-requisite is that it should be the judgment of a Court of competent jurisdiction within the meaning of section 11 of the Code of Civil Procedure.

Where a Court has no jurisdiction over the subject matter of the action in which an order is made, such order is wholly void, for jurisdiction cannot be conferred by consent of parties, and no waiver or acquiescence on their part can make up for the lack or defect of jurisdiction :

Where a Court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give its jurisdiction over the case, the decision is conclusive till it is set aside in an appropriate proceeding. But where there has been no such adjudication the decree remains a decree without jurisdiction and cannot operate as *res judicata*.

A sub-mortgagee is entitled to bring a suit against his mortgagor and to realise the dues on his mortgage by sale or foreclosure ; It is also open

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Sanction for prosecution—(*Contd.*).

rules of prudence to which any Court exercising its discretion would have regard, and pre-eminently among them, possibly a compendious statement of all, would be the rule that the Court will be astute to see that there shall be no abuse of the administration of criminal justice."

Where there is a strong probability that the proceedings taken under section 195 of the Criminal Procedure Code, would be abortive, sanction for prosecution should be refused. **Chaudhuri Hosh v. Abdul Rahaman** ... 33

Sanction for prosecution under section 195 of Criminal Procedure Code, when refused; *See* Sanction for prosecution 33

Search warrant—*Examination of petitioner—Record—Criminal Procedure Code (Act V of 1898), Sec. 96—'An enquiry about to be made'—Investigation.'*

Per Chaudhuri, J.: Although there is no express provision requiring a Magistrate to make a record or keep notes of examination of a petitioner for search warrant, some record should be kept to enable the appellate Court to form an opinion as regards the materials upon which the Magistrate acted.

A Magistrate is not relieved from his duty by stating that he believed that the officer had formed a correct opinion.

An order under section 96 of the Criminal Procedure Code cannot be made to further a police investigation which may or may not result in an enquiry.

Per Newbould, J.: Section 96 of the Criminal Procedure Code empowers a Magistrate to issue a search warrant before any proceedings of any kind are initiated and in view of an enquiry about to be made.

The expression "An enquiry about to be made" does not include every investigation. **Jagannath Agarwalla v. The Emperor** 267

——— warrant, examination of petitioner for—Procedure; *See* Search warrant 267

——— warrant, if can be issued—Police officer asking for it; *See* warrant ... 345

Search warrant, when can be issued—Criminal Procedure Code, Sec. 96; *See* Search warrant 26

Second application to sue as pauper; *See* Pauper suit 351

Senior Judge, judgment of, prevails—difference of opinion between two Judges of the High Court—Propriety of order under section 145 of the Criminal Procedure Code; *See* Letters Patent, cl. (36) 183

Shebait—*Right of appointment—Private endowment—Founder making no provision for the devolution of office of shebait—No time for growth of usage or custom.*

Where a private endowment is of quite recent date affording no time for the growth of a usage or a custom and the founder has made no express provision for the devolution of the office of a shebait, the right of appointment to the office of shebait is vested in the founder or his representative: **Baranashi Mazumdar v. Sudarsan Das Mahanta** 174

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Right of transferee—Legal conveyance not executed—Transferee put in possession—Agreement to sell not denied before suit; *See* Transferee, right of 73

—— of worship, if property; *See* Pala, transfer of 37

—— to begin—Counsel for accused; *See* Evidence, admissibility of ... 402

—— to redeem, nature of; *See* Redemption, suit for 98

—— of management and right of service in connection with temples, ; *See* Pala, transfer of 37

Rioting—*Criminal Procedure Code (Act V of 1898), Sec. 403 (2)—Acquittal, previous—Trial, second, on same facts if legal—Indian Penal Code (Act XLV of 1860), Sec. 141—Unlawful assembly—Common object—Humiliating intervening person.*

Under sub-section (2) of section 403 of the Criminal Procedure Code, a person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1). The true test is, not so much whether the facts are the same in both trials as whether the acquittal on the first charge necessarily involves an acquittal on the second charge.

Where A and B were previously tried for an offence under section 342 of the Indian Penal Code:

Held, that they could still be tried for an offence under section 147 of the Indian Penal Code, though the acts constituting the offences formed the same transaction within the meaning of sub-section (1) of section 235 of the Code of Criminal Procedure.

An assembly of five or more persons is designated an "unlawful assembly," within the meaning of third clause of section 141 of the Indian Penal Code, where the common object is not to arrest persons who committed an offence, but to subject to humiliation persons who intervened on behalf of the offenders. **Ramaskay Ram v. King-Emperor** 476

Rules of natural justice, requirements of; *See* Member, expulsion of ... 247

Sale—*Duties of vendor and purchaser—Transfer of Property Act, (IV of 1882), Sec. 55.*

It is the duty of the purchaser to tender a conveyance to the vendor for execution as required by section 55 (1) (d) of the Transfer of Property Act, and until such tender is made or waived the purchaser has no right to obtain the title-deeds. **Ma Hnit v. Maung Po Pu** 87

——, irregular, effect of; *See* Redemption, suit for 98

—— certificate—Title, evidence of; *See* Suit, maintainability of 463

—— of *pala* and offerings apart from immovable property, if valid; *See* Pala, transfer of 37

—— of shebaiti right, if permissible; *See* Pala transfer of 37

Samanodaka—Heir; *See* Probate 81

Sanction for prosecution—*Discretion—Criminal Procedure Code (Act V of 1898), Sec. 195—Proceeding ulterior.*

Section 195 of the Code of Criminal Procedure vests in the Court a discretion as regards granting sanction to prosecute. "There are, however, certain

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Review—(*Contd.*).

Per Sanderson, C. J. and *Mookerjee, J.* :—The effect of the expression "discovery of new matter or evidence" in clause (b) of the proviso to rule 4 O. 47 of the Code of Civil Procedure, is the same as if the words used have been "new and important matter or evidence."

When an application for review has been granted, it is open to the appellant to impeach the propriety of the order on the ground of contravention of the provisions of clause (b) of the proviso to rule 4 order 47 of the Code of Civil Procedure.

Per Mookerjee, J. : A litigant who invokes the jurisdiction of a Court to grant a review must allege the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made. When an application has been made on this ground, it may be granted under rule 4, sub-rule (1) of order 47 of the Code of Civil Procedure if the Court is of opinion that the application for review should be granted. This rule is subject to proviso to rule 4.

The jurisdiction of the Court to grant a review depends upon the circumstances mentioned in rule 1 of order 47 of the Code of Civil procedure and rule 4 does not prescribe a different test.

Strict proof means proof according to the formalities of law. But proof according to the formalities of law does not imply merely an allegation in accordance with the formalities of law that facts contemplated by rule 1 exist. The Court must be convinced that the materials placed before it in accordance with formalities of law do prove the existence of the facts alleged :

Applications for review on the ground of discovery of new and important matter or evidence should be considered by Court with great caution.

Though rule 4 of order 47 states that when the Court is of opinion that an application for review should be granted, it shall grant the same, the opinion of the Court must be opinion according to law.

Per Fletcher, J. : The allegations must be strictly proved ; that means 'proved', within the meaning of the Indian Evidence Act. **Chiranjilal v. Tulsiram Jankidass** 134

———Small Cause Court decree—No deposit of cost in time—Provincial Small Cause Courts Act, Sec. 17—Limitation Act, Sec. 5 ; *See* Limitation 197

———, applications for, on the ground of discovery of new and important matter or evidence—Court's duty ; *See* Review 134

Revision—Criminal Procedure Code, Sec. 145—Injustice ; *See* Jurisdiction ... 183

———Finding as to forcible dispossession—Criminal Procedure Code, Sec. 145 ; *See* Jurisdiction 369

Revival of condoned offences, what constitutes ; *See* Divorce 435

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Revenue—(*Contd*).

A survey map may be presumed to be correct when made and to furnish valuable evidence of the state of things at that time. But this does not necessarily enable a party who asserts that a particular parcel of land was assessed with revenue in 1793, to discharge the burden which lies upon him to establish the affirmative of this proposition.

The question whether the facts stated on a *thak* or survey map were in existance, is essentially one of fact and should be determined on the facts and circumstances of each case.

Where the plaintiffs sue the Government for wrongful assessment of lands alleged to be part of their permanently settled estate, it cannot be laid down *a priori* that the relevant survey maps are or are not sufficient to shift the *onus* on to the defendant. **Prafulla Nath Tagore v. Secretary of State for India in Council** 320

——— sale—Title of the unrecorded assignee of a recorded proprietor; *See* Declaratory suit 372

Revenue Sale Law, Sec. 31—Application for payment of surplus sale proceeds by the unrecorded assignee of a recorded proprietor; *See* Declaratory suit 372

———————, Sec. 31—Representative—Unrecorded assignee of a recorded proprietor; *See* Declaratory suit 372

———————, Sec. 31—Unrecorded assignee of a recorded proprietor, when entitled to receive surplus sale proceeds of revenue sale; *See* Declaratory suit 372

Review—*Civil Procedure Code (Act V of 1908), O. 47 Rr. 1, 4, 7—"Discovery of new and important matter or evidence"—Allegations to be strictly proved—Strict proof—New evidence—Appellate Court, power of—Opinion of Court.*

Before a Court can exercise a jurisdiction vested in it to grant an application for review on the ground of new and important matter or evidence, it is incumbent on the Court to be satisfied with the allegation of the applicant that the evidence in question constituted new and important evidence within the meaning of rule 1 order 47 of the Code of Civil Procedure. The Court must further have strict proof of the allegation that the evidence was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or order made.

If a Court without adjudication of the allegation that the evidence which the applicant seeks to produce was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, grants an application for review, the order is contrary to the provisions of rule 4 of order 47 of the Code of Civil Procedure.

It is competent to an appellate Court to finally deal with the matter on the materials on the record.

Per Sanderson, C. J.: The new evidence must be such that if adduced it would be practically conclusive; that is, evidence of such a class as to render it probable almost beyond doubt that the decision or judgment would be different.

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Res judicata—Court judicially considering and adjudicating question of jurisdiction; *See* Sub-mortgage 272

————Decision void for want of jurisdiction over the subject matter; *See* Sub-mortgage 272

————*Execution for costs—Mortgage decree—Sale insufficient to pay off the mortgage decree—Subsequent application for execution of decree for costs—No supplemental decree under Order 34, rule 6 of the Code of Civil Procedure (Act V of 1908).*

The respondent joined the appellants as defendants in the mortgage suit on the allegation that they were transferees of the equity of redemption. He obtained the usual mortgage decree specifying the amount due on the mortgage and the costs of the suit. The appellants were not made personally liable for the costs. Execution was taken out in due course and the mortgage decree was satisfied in part. But although the mortgaged properties had been exhausted a considerable sum still remained due to the decree-holder. The decree-holder thereupon applied for execution. The office raised a question as to whether execution could be had before the decree-holder had obtained a supplemental decree in accordance with order 34, rule 6 of the Code of Civil Procedure. The Court thereupon directed that the record should be sent for and that the matter should be put up for consideration in the presence of the decree-holder. No notice of the application was served upon the present appellants or upon any of the other judgment-debtors. The Court subsequently came to the conclusion (and this was an *ex parte* decision) that a supplemental decree was not necessary and that execution could issue on account of costs against the present appellants. Execution was issued with the result that the present appellants forthwith appeared before the Court and objected that they were not liable under the decree. The Court over-ruled the objection and held that as the matter was previously decided they were bound by that order:

Held, that the order did not operate as a *res-judicata*. **Ilm Molla v. Manindra Mohan Poddar** 382

————, question of, how to be decided; *See Resjudicata* 507

Retrial—Appellate Court—Plea of guilty not to be recorded; *See* Criminal Procedure Code, Sec. 412 122

Revenue, *settlement of—Beds of public navigable river—Burden of proof—Lands included in Permanent Settlement—Presumption—Survey map—Facts stated on* Thak *or survey map.*

Beds of public navigable river are the property of the Crown.

A party alleging that at the time of the Permanent Settlement, the disputed lands were included in permanently settled estates and were settled with his predecessors as part and parcel of the estate granted to him, must prove it. The burden of proof lies on him, on the principle that if his allegation is not made out, the decision of the revenue authorities is not displaced and remains unaffected.

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Rent—(*Contd.*).

specified in the patta, kabuliat or counterfoil rent receipt was entered in it after measurement, so that if the landlord can prove such a practice, it will be presumed that the area entered in the patta, kabuliat or rent receipt was entered after measurement, though he is not able to prove that as a matter of fact the lands in the particular case were settled after measurement : **Umed Ali v. Nawab Khaja Habibulla** 65

Res judicata—*Civil Procedure Code (Act V of 1908), Sec. 11—Claiming under different title—Claim raised but not decided.*

The present suit was instituted against J. asking for a declaration that the properties mentioned in the plaint were acquired by D, and that he died possessed thereof, and that the plaintiffs as his heirs were entitled to possession of such properties. Previously a suit No. 217 of 1912 were brought by the present plaintiffs against their father D, and the present defendant, asking for a declaration that D held the identical properties, which were claimed in the present suit, as trustee for them. D died shortly after the institution of suit No. 217. That suit was amended on the plaintiffs' application by recording the death of D and a new summons was issued to J, the remaining sole defendant in suit No. 217. No amendment having then been made or applied for in order to raise the claim put forward in the present suit, all matters in the suit were referred to arbitration. Late in the arbitration the present plaintiffs applied to the arbitrators to decide the claim which was made in the present suit. The arbitrators decided that they had no jurisdiction to do so as the only matter referred to them had been the question of trust. Thereafter the plaintiffs in suit No. 217 applied to the Court asking that they might be at liberty to amend by raising in that suit the claim that was made in the present suit. The application was refused :

Held, that the suit was not barred by *res judicata*, as the plaintiffs were suing under a different title to that under which they were endeavouring to support their claim in the first suit, as also that the plaintiffs' attempt to raise that point was refused by the former Court. **Mohan Lal Shah v. Jahury Lal Shah** 163

Res judicata—*Civil Procedure Code (Act V of 1908), Sec. 11—Directly and substantially in issue—Suit for ejectment, previous—Pleadings, issues and judgment—Status, question of.*

The question of *res judicata* is to be decided with reference to the pleadings, the issues and the judgment : *cases on the point* referred to.

In the previous litigation, the plaintiff sued to eject the defendant on the allegation that he himself was a raiyat and the defendant herself was an under-raiyat. The claim for ejectment failed, because the Court found it established that the defendant had a "protected interest" within the meaning of section 160 of the Bengal Tenancy Act :

Held, that the decision of the question of *status* involved in the subsequent suit to restrain the defendant from cutting trees on her holding was not barred by *res judicata*, as it was not directly and substantially in issue in the previous suit. **Indubala Debi v. Atul Chandra Ghosh** 307

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Registration, If valid—Document executed by one of two parties on behalf of himself and the other; *See* Letters Patent, cl. (15), appeal under ... 447

——— Act—Memorandum accompanying an equitable mortgage, a mere record of certain facts; *See* Equitable mortgage 375

Registration Act, Secs. 17 (1) and (2), 49—Agreement for lease; *See* Document 298

Rent, *enhancement of—Presumption—Bengal Tenancy Act (VIII of 1885), Sec. 50 (2)—Amalgamation of tenures—New tenancy.*

A suit was instituted for enhancement of rent of a tenure. Defendants prove payment of rent at the same rate for a period of 20 years before the institution of the suit. Plaintiff produced a Kabuliat of the year 1260, corresponding to 1853 and relied upon it as showing that the tenants had agreed to pay enhancement of rent. There were originally four separate tenures which were amalgamated into one by the Kabuliat of 1853, the Kabuliat expressly stated that enhanced rent would be paid according to the rate of enhancement in the village. The other incidents of the tenure mentioned in the Kabuliat were not shown by the defendants to be the incidents of the four original tenures:

Held, that the plaintiff was entitled to enhancement of rent; as he rebutted the presumption arising under section 50 (2) of the Bengal Tenancy Act: **Dhirendra Nath Ghosh v. Gopi Charan Saha** 12

——, enhancement of—Rent payment of, at a uniform rate for a period exceeding 20 years—Bengal Tenancy Act, Sec. 50; *See* Burden of Proof ... 11

Rent, *suit for*—Talab baki *papers—Evidentiary value—Evidence Act (I of 1872), Secs. 32 (2), 34—Bengal Tenancy Act (VIII of 1885), Sec. 52 (6)—'Time of measurement.'*

Under section 34 of the Evidence Act, *talab baki* papers are not sufficient evidence to charge any person with liability.

Talab baki papers may be evidence under section 32 Cl. (2) of the Evidence Act; but before they can be admitted, a landlord is to show that the person making the statement is dead and the entries are made by him in the ordinary course of business.

The words "At the time the measurement on which the claim is based was made" in sub-section 6 of section 52 of the Bengal Tenancy Act, do not refer to the measurement upon which the excess area is found out before the institution of the suit but refer to the measurement made at the time of the original settlement.

A landlord has to prove under section 52 of the Bengal Tenancy Act, that there has been an increase in the area for which rent was previously paid and in order to do so, he must show that the land was measured at the time of the inception of the tenancy by a particular standard of measurement and that there has been an increase in the area on measurement by the same standard. The section merely provides that if the landlord proves that at the time the measurement on which the claim is based was made, there existed a practice of settlement being made after measurement of the land assessed with rent, it may be presumed that the area

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Redemption—(*Contd.*)

Per N. R. Chatterjee, J. : Section 10 of the Limitation Act would not apply to such a suit.

Per Sanderson, C. J. : The presumption under section 114 Illus. (e) of the Evidence Act, that a decree-holder purchaser obtained permission to bid is not to be drawn in the absence of any evidence and in view of the terms of section 99 of the Transfer of Property Act.

Per Mookerjee and N. R. Chatterjee JJ. : The effect of a *kabuliat* executed by a mortgagor to a mortgagee, after its execution, was that of landlord and tenant and not that of mortgagee and mortgagor. The mere fact that the lands were let out to the mortgagor, would not alter the relation between the parties.

A suit for recovery of rent, although the sum to be recovered is to be applied in satisfaction of the interest due on the mortgage, is not a suit for recovery of arrears of interest on the mortgage.

Per Mookerjee J. : The right to redeem is not a personal right; it is an interest in the property mortgaged, so that when the equity of redemption has been sold away, the mortgagor can no longer exercise his right of redemption.

At the time when the Transfer of Property Act was passed, the rule has been recognised by Courts that where a mortgagee had obtained a money decree for the mortgage debt and had, without the leave of the Court, taken the equity of redemption in execution, he has, on equitable grounds liable to be treated, notwithstanding his purchase, as a mortgagee holding the property in trust for the mortgagor. The legislature recognised the prevailing rule of equity in section 99 of the Transfer of Property Act, but modified its application in two directions. In the first place, the mortgagee was prohibited to purchase the equity of redemption in execution of his own decree, whether it was a money decree for the mortgage debt or for a claim related thereto whether it was a decree for a claim entirely unconnected therewith. In the second place, the prohibition was absolute, and the legislature did not contemplate a purchase by the mortgagee even with the leave of the Court.

Section 99 of the Transfer of Property Act has not been replaced by a less comprehensive rule (O. 34 r. 14 of the Code of Civil Procedure). The disability of the mortgagee is restricted to cases where he purchases the equity of redemption at a sale held in execution of a decree for the payment of money in satisfaction of a claim arising under the mortgage. The mortgagee, if he has a claim against the mortgagor independent of the mortgage, has the same right that other creditors have to realise it by the attachment and sale of the equity of redemption. In such a case, the decree-holder must obtain leave to bid under O. 21 r. 72 of the Code of Civil Procedure, and when he has obtained leave, he is in the position of an independent purchaser : This differentiates the case of an execution sale from a private sale of the equity of redemption. **Uttam Chandra Daw v. Raj Krishna Dhal** 98

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Receiver, appointed in the presence of the mortgagor and the second mortgagee, at the instance of the first mortgagee, for whose benefit holds the property—Second mortgagee purchasing equity of redemption in execution of his decree; *See* Receiver 385

Redemption, *suit for—Transfer of Property Act (IV of 1882), Sec. 99, sale in contravention of, effect of—Irregular sale—Sale, what passed at—Procedure for setting aside sale—Suit to enforce a trust—Limitation Act (IX of 1908). Sec. 10, Sch. I Arts 120, 148—Evidence Act (I of 1872), Sec. 114 Illus. (e)—Presumption—Leave to bid—Mortgagee purchaser, if a trustee—Mortgage by conditional sale—Lease of mortgaged property to mortgagor by mortgagee—Relation of parties—Rent, suit for—Suit not for recovery of arrears of interest on mortgage—Civil Procedure Code (Act V of 1908) O. 34 R. 14—Right to redeem, if a personal right—Equity of redemption, sale of—Mortgagor, if can exercise right of redemption.*

Per Curiam: Where a mortgagee has, in contravention of section 99 of the Transfer of Property Act, attached the mortgaged property and brought it to sale and purchased it himself, the mortgagor or his transferee cannot successfully maintain a suit for redemption of the property, without first getting the sale set aside;

A sale in contravention of section 99 of the Transfer of Property Act, is not a nullity;

Per Mookerjee, J.: Such a sale is an irregular sale liable to be avoided, merely on proof that the terms of the section had been contravened. It operated to transfer the equity of redemption from the mortgagor to the mortgagee. It could be set aside at the instance of the judgment-debtor on an application under section 244 of the Code of Civil Procedure of 1882. If such application was not made either before or after confirmation, the sale became final and conclusive, and under section 316 of the said Code of Civil Procedure, the title to the property sold (that is, the equity of redemption) vested in the purchaser from the date of confirmation, so far as regards the parties to that suit and persons claiming through or under them.

An irregular sale must be formally vacated and cannot be ignored as a nullity.

Per Curiam: Assuming that by reason of sale, the mortgagee became trustee of the equity of redemption for the mortgagor, a suit for redemption would not lie.

Per Sanderson C. J.: If the suit be treated as a suit to enforce a trust, article 120 and not article 148, schedule I of the Limitation Act would apply.

Per Woodroffe, J.: Neither article 148 nor section 10 of the Limitation Act would apply to such a suit, if maintainable. Article 148 refers to a suit for redemption and not to a suit where equity of redemption has passed out of the mortgagor who seeks to enforce a trust in his favour upon the taking of an account which is not that of an ordinary mortgage suit.

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Professional license—(*Contd.*).

term and concerns the interest of a public body, it interferes. **The Chairman of the Howrah Municipality v. Barada Prasanna Pain** 127

Professional usage—Strict compliance with requirements; *See* Counsel ... 313

Property dedicated to deity, nature of; *See* Pala, transfer of 37

Provincial Small Cause Courts, powers of—Attachment of movables before judgment; *See* Movables, attachment of 179

————————, Sec. 17—Review—No deposit of cost in time—Limitation Act, Sec. 5; *See* Limitation 197

Public navigable river, beds of—Crown, property of; *See* Revenue, settlement of 330

Purchaser, real, at an auction sale, held in 1903, suit by, against an assignee of a certified purchaser, if maintainable; *See* suit, maintainability of ... 463

————, when entitled to title deeds; *See* Sale 87

————, from Hindu widow, if to prove legal necessity—Hindu widow, ad-administratrix of her husband's estate—Leave obtained from Judge of Probate Court, as to sale; *See* Hindu widow 379

Raiyati, interest, value of; *See* Land acquisition 204

Receiver—*Mortgagee's right to appoint receiver—Mortgagee's right to profit—Receiver appointed by the first mortgagee in presence of mortgagor and second mortgagee—Second mortgagee purchasing equity of redemption, effect of.*

A receiver may be appointed at the suit of a first mortgagee when there is reason to apprehend that the property was insufficient to pay the incumbrance thereon.

Whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a receiver, if the demands of justice require that the mortgagor should be deprived of possession.

A receiver can be appointed at the instance of a mortgagee who holds a simple mortgage.

A receiver who was appointed in the presence of the mortgagor and the second mortgagee at the instance of the first mortgagee, holds the property for his (first mortgagee's) benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. The order for the appointment of the receiver was binding upon the mortgagor and the second mortgagee. The fact of the second mortgagee's obtaining a decree on his mortgage in the absence of the first mortgagee and purchasing the equity of redemption in execution of that decree, did not alter his position in relation to the receiver at the instance of the first mortgagee. **Maharaja Sir Rameswar Singh Bahadur v. Chunni Lal Shaha** 385

————, when can be appointed in a suit by a first mortgagee; *See* Receiver 385

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Procedure—Examination of petitioner for search warrant; *See* Search warrant... 267

————Sub-mortgagee proceeding against his mortgagor and mortgagor of his mortgagor—Mortgagee's property situate in the town of Calcutta—Original mortgagor's property situate in the mofussil; *See* Sub-mortgage 272

————*Witness failing to appear—Civil Procedure Code (Act V of 1908), O. 16, Rr. 11, 12—Fine, when can be imposed.*

Rule 11 of order 16 of the Code of Civil Procedure provides for a case where the person satisfies the Court that he has not intentionally failed to carry out the order: Rule 12 applies to the alternative case of a person failing to satisfy the Court whether he appears in order to offer an explanation or not. But in either case whether the facts are those contemplated in rule 11 or rule 12 the Court can only proceed after attachment of the property. **Sib Kumari Debi v. Secretary of State for India in Council** 363

Production, preventing—Removing a document; *See* Insolvent 209

Profession—Usage and etiquette—Solicitor, instruction of; *See* Counsel ... 313

Professional license—*Effect of not taking—Calcutta Municipal Act (III B. C. of 1899), Secs. 378, 631—Offence, when committed—Limitation—Acquittal, order of, if and when can be reviewed.*

A pleader practised in a Court in the year 1917-18 without taking a license:

Held, that he was guilty of an offence against the provisions of section 378 of the Calcutta Municipal Act on the last date of 1917-18, that is on the 31st March, 1918, and a complaint lodged within three months of that date was not barred under clause (1) of section 631.

Per Richardson, J.: The offence under section 578 of the Calcutta Municipal Act lies in the person exercising a profession after the 1st of July in any year without having the prescribed license. If the profession is so exercised on subsequent days, there may be a doubt, whether a separate offence is committed on each day or whether it is all one continuing offence.

If the profession is exercised on one day only the prosecution must be commenced within the following three months. If it is exercised on a number of days, whether the offence is a continuing one or not, the prosecution must be commenced within three months of the last of such days.

Per Shamsul Huda, J.: For the purpose of carrying on a pleader's profession, it is not necessary that he should every day conduct a case or attend or address the Court. For instance, the fact of keeping an office for the purpose of receiving his clients, giving them advice or being generally open to engagement as a pleader, will all constitute the carrying on of a pleader's profession.

Per Curiam: As a rule the High Court does not interfere with an order of acquittal. But when a case is not a criminal one in the strict sense of the

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Presumption—(*Contd*).

The gist of the principle upon which a lost grant is presumed, is that the state of affairs is otherwise unexplained.

When from a certain set of facts, a Court infers a lost grant, the process is one of inference of fact and not of legal conclusion. **Kasi Nath Bhattacharjee v. Hargri Chandra Pal** 501

———*Standard of measurement—Suit for additional rent.*

In a suit for additional rent for additional area, it was found that the standard of measurement set up on behalf of the plaintiff was inconsistent with the Kabuliat upon which the suit was based :

Held, that the present standard of measurement could not be presumed to be the standard in use at the time of the inception of the tenancy. **Madhabi Sundari Dasya v. Syama Charan Biswas** 202

———, how rebutted—Hindu family residing in a particular place—Migration ; *See* Burden of proof 52

Preventing—Existence ; *See* Insolvent 209

Priestly office, sale of, for the benefit of a shebait, if legal ; *See* Pala, transfer of 37

Private alienations—Custom ; *See* Pala, transfer of 37

——— alienations of right of service in connection with temples ; *See* Pala, transfer of 37

Probate—*Opposition to grant—Interest—Grandfather's daughter's son's son—Samanodaka—Spiritual benefit—Appeal—Order rejecting opposition to grant of probate—Civil Procedure Code (Act V of 1908), Sec. 115.*

A grandfather's daughter's son's son having some sort of relationship with the family, has some interest to appear and oppose the application for probate made by a stranger to the family *viz.* the brother of the sister's husband of the deceased.

Quære : Whether a grandfather's daughter's son's son is excluded from inheritance under the Bengal School even where there is no other heir at all ?

Every *samanodaka* cannot be heir. In order that he may inherit, he must also be a *Sakulya i. e.* must belong to the *kula* or family.

The principle of spiritual benefit is the test of heirship under the Dayabhaga school.

No appeal lies against an order of a District Judge holding that the objector had no *locus standi* to oppose the grant of probate. Such an order can be revised by High Court under section 115 of the Code of Civil Procedure. **Radharaman Chowdhuri v. Gopal Chandra Chakravarty** ... 81

———, grant of, who can oppose—Interest—Grandfather's daughter's son's son ; *See* Probate 81

Procedure—Divorce case—Marriage, solemnization of—Marriage, date of ; *See* Marriage, dissolution of 340

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Plaint, return of—Civil Procedure Code, O. 7, R. 10 (1), O. 49. R. 3.—Suit instituted in the Original Side of the High Court; *See* Suit, maintainability of 327

Plea of guilty, passed on a mistake of law, effect of; *See* Criminal Procedure Code, Sec. 412 122

Pleader, *suspension of—Misconduct—Criminal prosecution not likely to succeed—Legal Practitioners Act (XVIII of 1879), Sec. 13 (f).*

Although there is no inflexible rule that there must in every case be a trial and conviction for criminal misconduct before disbarment will be ordered, that should be the ordinary rule, where the misconduct alleged has no direct connection with the conduct of the pleader in his practical and immediate relation to the Court. Where the misconduct attributed indicates unfitness to discharge professional duties, a criminal conviction may not always be a pre-requisite to the adoption of disciplinary measures; and, indeed, notwithstanding acquittal on the criminal charge, disciplinary measures may be successfully taken. The test to be applied in each case is, whether the person concerned will be prejudiced by the adoption of summary procedure for the investigation of what is in reality a grave criminal charge.

The rule deducible from *Anon*; *Anon*; *Anon*; *Stephens* v. *Hill* is as follows: An attorney will be struck off the roll if convicted of felony or if convicted of a misdemeanour involving want of integrity, even though the judgment be arrested or reversed for error; and also, without a previous conviction, if he is guilty of gross misconduct in his profession or of acts which, though not done in his professional capacity, gravely affect his character as an attorney; but in the latter case, if the acts charged are indictable and are fairly denied, the Court will not proceed against him until he has been convicted by a jury; and will in no case compel him to answer under oath to a charge for which he may be indicted. **Chandi Charan Mitra v. King-Emperor** 471

Pleader's profession, carrying on of; *See* Professional license 127

Possession of stolen goods, when; *See* Penal Code, Sec. 411 310

Poverty—Delay in presenting petition by husband for dissolution of marriage on the ground of adultery; *See* Divorce 435

Practice of admitting appeals subject to objection at the hearing, condemned; *See* Appeal 1

Presidency Towns Insolvency Act, proceeding under, charge framed in a—Error or irregularity, effect of; *See* Insolvent 209

——— ——— ———, Sec. 36 cl. (2)—'Any person'; *See* Insolvent 209

Presumption—Hindu family migrating from one province to another—Law, custom and family relation; *See* Burden of proof 52

———Law of place—Hindu family residing in a particular province; *See* Burden of proof 52

———*Lost grant—Question of fact*

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Perpetual injunction—*Specific Relief Act (I of 1877), Secs. 53, 54, 56—New point, when can be raised in appeal.*

The right to an injunction depends, in India, upon statute and is governed by the provisions of the Specific Relief Act.

Section 53 of the Specific Relief Act defines the mode in which a perpetual injunction can be granted and its restraining effect on the defendant when it has been granted.

In order to entitle a litigant to a perpetual injunction, he must establish that the injunction is required to prevent a breach of an obligation. The term 'obligation,' according to section 3 of the Specific Relief Act, includes every duty enforceable by law, so that when a legal duty is imposed in one person in respect to another, that other is invested with the corresponding legal right.

The first paragraph of section 54 of the Specific Relief Act, establishes the broad and general rule that given the breach of an existing legal right which is vested in the applicant, the breach thereof may be restrained by injunction.

When a plaintiff applies for an injunction to restrain a violation of an alleged right, if the existence of the right be disputed, he must establish that right before he gets the injunction to prevent the recurrence of its violation.

Sections 54 and 56 of the Specific Relief Act are to be read together as supplementing each other. The former defines the circumstances under which perpetual injunctions may be granted; the latter enumerates the cases where an injunction must not be granted. The right to an injunction cannot be determined independently of the provision of sections 54 and 56 by reference to the terms of section 53.

An injunction cannot be granted when equally efficacious relief can certainly be obtained by any other usual mode of proceeding (except in case of breach of trust).

A pure question of law, not depending on the determination of a question of fact, though not raised in the primary Court nor mentioned in the memorandum of appeal, and is not one of jurisdiction in the sense of competency of the Court to entertain the suit, can be raised at the hearing of appeal, if it goes to the root of the matter and raises the question whether the Court was competent to grant the relief claimed by the plaintiff. **Ram Kissen Jeydeyal v. Peoran Mall** 259

Perpetual injunction, when can be granted; *See* Perpetual injunction ... 259

Person having management and possession of the property of an idol, power of; *See* Pala, transfer of 37

Personal law—Locality—Mixture of customs and ceremonies; *See* Burden of proof 58

Petition by investigating officer, weight of; *See* Warrant 345

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Pauper suit—(*Contd.*).

plaints a refusal of the application to sue as a pauper on the fourth ground mentioned in rule 5, namely, that the allegations of the petitioner do not show a cause of action.

Rule 15, order 33 contemplates the refusal of a second application when it is in respect of the same right to sue; that is, the right to sue which formed the basis of the previous application.

An application for leave to sue in *forma pauperis* by the petitioner, who was the wife of the opposite party, for maintenance from her husband was dismissed on the ground that the allegations in the plaint did not show a cause of action. More than two years afterwards, she made the present application on the 5th August, 1918, for leave to sue in *forma pauperis* to recover maintenance from her husband for a period of more than two years subsequent to the date when the previous application was filed:

Held, that the subsequent application to sue in *forma pauperis* was not barred by rule 15, order 33 of the Code of Civil Procedure.

There is no substantial distinction between 'a right to sue' in rule 15 and 'a cause of action' in rule 5, order 33.

A right to maintenance is a recurring right, accruing from day to day. It may be extinguished or modified by a change of circumstances. **Ratnamala Dasi v. Kamakshya Nath Sen** 351

Penal Code, Sec. 141—Unlawful assembly—Common object—Humiliating person intervening; *See* Rioting 476

————, Sec. 161—Accomplice—Offence under alternative case upon same facts; *See* Misdirection 20

————, Sec. 401—Habit, how proved—Criminal Procedure Code, Sec. 234; *See* Thieves, gang of, belonging to 192

———— (*Act XLV of 1860*), *Sec. 411—Possession—'Recently' stolen—Reasonable explanation—Burden of proof.*

Under section 411 of the Indian Penal Code, the possession of stolen goods by the accused must be possession ***soon after the theft*** or the stolen goods must have been 'recently' stolen.

Where the prisoner is charged with receiving stolen property, when the prosecution has proved the possession by the prisoner, and the goods had been recently stolen, the Jury may be told that they *may*, not that they *must*, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the Jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the Jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the *onus* of proof imposed upon it of satisfying the Jury beyond reasonable doubt of the prisoner's guilt. That *onus* never changes; it always rests on the prosecution: **Hafizan Mondal v. King-Emperor** 319

performed to your own satisfaction, to the satisfaction of the members of the Bar, to the satisfaction of the Vakils, to the satisfaction of my branch of the profession, to the satisfaction of the litigants and to the satisfaction of the public.

Sir Asutosh Mookherji in reply said:—Mr. Advocate-General, Mr. Bose and Mr. Mitter, I desire to thank you and through you the members of the profession on whose behalf you have spoken for the cordial reception you have given me and for the good wishes you have so kindly expressed. Since 1904 when I was invited to accept a seat on the Bench of this Court, I may say conscientiously, I have never spared myself in the discharge of my judicial duties and it is a source of genuine satisfaction to me to find that I enjoy the confidence of all branches of the profession. I wish I could persuade myself that I possess all the good things which you so generously attributed to me; but I realise that whatever success I may have achieved in the discharge of my judicial duties that success is in a very large measure due to the assistance which I have received from the members of the profession who have appeared before me and who have assisted me with their great talent and learning. The value of that assistance is not probably always realised or acknowledged. I venture to express the hope that during the short time that I may have to preside over the deliberations of this Court I may continue to receive that assistance so that the great traditions of this Court may remain unbroken. I thank you again for your kind and cordial reception.

NOTES ON CASES.

Workman—Injury by accident—Compensation, how to be measured.

[1920] 1 K. B. 88.

1919.

Ling v. De Dion Bouton.

L was engaged as cook house-keeper earning £55 a year with board and lodging. On February 28, 1916, she entered the employment of the respondents, munition manufacturers as a lathe worker. On September 11, 1916, while engaged in turning and gauging shells she met with an accident resulting in an injury to her hand and the permanent shortening of her right thumb, and loss of grip. At the time of the accident her average weekly earnings were £4. 8s. 8d. When, however, she recovered sufficiently she resumed her former occupation and obtained a situation as a temporary cook at 20s. a week with board and lodging and expressed

an intention of not returning to munition work. She made an application for compensation for injury she had suffered. She also produced evidence that owing to her injury she could not now do work similar to shell turning and that she was to some extent handicapped in her work as a cook. The County Court Judge found that the injury did not justify an inference that her earning capacity as a cook or cook house keeper was reduced and held that the question of her capacity as a lathe worker did not arise as she had no intention or desire to resume such work and had made no attempt to obtain it. The Judge accordingly awarded no compensation. On appeal it was *held* that the judge's mode of dealing with the case is wrong, that the measure of the compensation is the diminution of the wage earning capacity in consequence of the injury and that the diminution is to be measured by a comparison of the capacity previous to the injury with the capacity after the injury measured by the amount which the workman is then earning or is able to earn.

Held, further, that the consideration of her previous employment was irrelevant.

R. M.

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Can a High Court Vakil be appointed permanent ChiefJustice of a High Court ?

In our issue of April 1920 we reported the proceedings in Court when the Hon'ble Sir Asutosh Mukerjee took his seat as Acting Chief Justice. Babu Basant Kumar Bose on behalf of the vakil branch of the profession said in the course of his speech :—"It is to us a matter of special gratification, that for the third time in the history of the Court a member of our body has been summoned to fill the highest judicial appointment in the land, although we recognise *that under the present constitution such appointment must only be a temporary one.*"

The statement italicised has attracted much attention and our esteemed contemporary, the *Madras Weekly Notes* has pointed out in its issue of 11th April, 1920, that the statement is not correct. Mr. Krishnaswami Iyer in an article published in the *Madras Citizen*, dated 24th April, 1920, has very successfully maintained the same view as the Madras Weekly Notes. We reproduce below these two articles and to make them intelligible we set out here section 2 of the Indian High Courts Act, 1861, as also section 101 of the Government of India Act, 1915, which has re-enacted the previous provision with a material alteration, thereby removing whatever doubts might have existed on the subject.

Section 2 of the Indian High Courts Act, 1861.

The High Court of Judicature at Fort William in Bengal, and at the Presidencies of Madras and Bombay, respectively, shall consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty may. from time to time, think fit and appoint, who shall be selected from

1st. Barristers of not less than five years' standing ; or

2nd. Members of the Covenanted Civil Service of not less than ten years' standing, and who shall have served as Zillah Judges or shall have exercised the like powers as those of a Zillah Judge for at least three years of that period ; or

3rd. Persons who have held Judicial Office not inferior to that of Principal Sudder Ameen or Judge of a Small Cause Court for a period of not less than five years ; or

4th. Persons who have been pleaders of a Sudder Court or a High Court for a period of not less than ten years, if such pleaders of a Sudder Court shall have been admitted as pleaders of a High Court :

Provided that not less than one-third of the Judges of such High Court respectively, including the Chief Justice, shall be Barristers, and not less than one-third shall be Members of the Covenanted Civil Service.

Section 101, Sub-sections 2, 3 and 4 of the Government of India Act, 1905.

(2) Each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint : Provided as follows :—

(i) the Governor-General in Council may appoint persons to act as Additional Judges of any High Court, for such period, not exceeding two years, as may be required; and the Judges so appointed shall, whilst so acting, have all the powers of a Judge of the High Court appointed by His Majesty under this Act.

(ii) the maximum number of Judges of a High Court, including the Chief Justice and Additional Judges, shall be twenty.

(3) A Judge of a High Court must be,—

(*a*) A Barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland, of not less than five years' standing ; or

(*b*) a member of the Indian Civil Service of not less than ten years' standing, and having for at least three years served as, or exercised the powers of a District Judge ; or

(*c*) a person having held judicial office, not inferior to that of a Subordinate Judge or a Judge of a Small Cause Court, for a period of not less than five years ; or

(*d*) a person having been a pleader of a High Court for a period of not less than ten years.

(4). Provided that not less than one-third of the Judges of a High Court, including the Chief Justice but excluding Additional Judges, must be such Barristers or Advocates as aforesaid, and that not less than one-third must be members of the Indian Civil Service.

Extract from the Madras Weekly Notes.

Can a High Court Vakil be appointed permanent Chief Justice of a High Court?

On the statement which we have italicised in the first paragraph we are forced to join issue. We do not agree with the interpretation placed by the Vakil member on section 101, clause (4) of the Government of India Act, 1915. Though it is too much to expect any light to be thrown on the interpretation of the section by the learned Acting Chief Justice, situated as he was, we yet venture to submit our own construction of that section.

It may be observed at once that neither in the earlier enactment of 1862 or in the later Act of 1915 is there any express provision in the body of the section that the Chief Justice shall be a Barrister. The question is whether the proviso fixing the number of Barrister and Civilian Judges also enacts that the Chief Justice shall be a Barrister.

The proviso in the earlier Act of 1862 ran thus:—"Provided that not less than one-third of the Judges of such High Courts respectively, including the Chief Justice, shall be Barristers, and not less than one-third shall be members of the Covenanted Civil Service." Does the expression 'including the Chief Justice' qualify 'not less than one-third' or is it intended to denote that the Chief Justice shall be a Barrister. It may be argued that if the latter be not intended, the expression 'including the Chief Justice' might well have been omitted; but we have to point out that the earlier part of the section states that the High Court shall consist of a Chief Justice and a certain number of Judges not exceeding fifteen and a question may be raised and, we think, was raised whether the Chief Justice is to be classed as a Judge falling within the statutory number. We think that as the section speaks of the Chief Justice as somewhat apart from the ordinary Judges, for the purpose of clearly specifying the proportion, the Chief Justice is expressly included in the computation: and the proviso does in no way prescribe the qualifications of a Chief Justice. But the practice has been otherwise and the other meaning seems to have gained favour with the authorities.

It may now be observed that in section 101 of the Government of India Act, 1915, the matter is made very clear. The new section in 1915 is as follows :—"Each High Court shall consist of a Chief Justice and as many other Judges as His Majesty may think fit to appoint '*provided that not less than one-third of the Judges of a High Court, including the Chief Justice but excluding additional Judges, must be such barristers or advocates as aforesaid and that not less than one-third must be members of the Indian Civil Service.*' The analogous expression under the later Act is "including the Chief Justice and excluding the Additional Judges" whom the Governor-General is empowered to appoint. We do not think it can be contended that the expression goes with "shall be barristers" and it seems to us to be clear that for fixing the proportion of Barrister and Civilian Judges, the number shall include the Chief Justice but not the Additional Judges. Otherwise, this strange result will follow that the Civilian Judges should be one-third of the total number inclusive of the additional Judges or in other words, the proportion of Barrister and Civilian Judges would appreciably differ; and we think that is plainly not the intention of the legislature. We are also strengthened in our view by looking at the analogous provision in the Presidency Small Cause Courts Act; see section 2 (3) of Act XXIV of 1917.

We are, therefore, of opinion that whatever doubts one may feel in construing the earlier Act the present enactment does not preclude a Vakil from being appointed as the permanent Chief Justice.

The tendency of modern legislation also may be borne in mind in this connection. The barrister qualification was enacted as indispensable at a time when the indigenous lawyer the Vakil with his high university qualification and deep learning had not come into existence. As we have observed often, the Vakil combines in himself the erudition of the barrister and the local knowledge of the civilian. This claim of the vakil class has been recognised in recent enactments of the Indian Legislature. Having regard to the high level of attainments of the pleaders of Indian High Courts the legislature has removed the historical anomaly of a barrister's qualification. Under section 4 of the Official Trustees' Act (II of 1913), and section 3 of the Administrator-Generals Act (III of 1913), a Vakil enrolled by a High Court is equally competent with a barister to be appointed an Official Trustee or Administrator-General. By Act XXIV of 1917 an Advcate, Vakil or Attorney is made competent to fill the post of a Chief Judge of the Small Cause Court.

Extract from the Madras Citizen.

The Chief Justiceship of a chartered High Court.

(By Mr. K. V. Krishnaswami Aiyar, B.A., B L.)

There is a prevailing impression, not yet dispelled by our leading lawyers or even carefully examined and pronounced upon by them, that no one but a barrister of England or Ireland or an Advocate of Scotland can legally be appointed to the permanent office of the Chief Justice of a High Court. This impression as to the state of the law is nothing recent, but has existed for more than half a century, since the constitution and establishment of the High Courts. Right or wrong, it must have resulted from various causes. On the one hand, the language of the early statutes was by no means clear against the prevailing view and, on the other, the occasion or the inclination to look deeper into the question and to put forward a contrary construction must have been lacking. But now a new era has dawned since the passing into law of the consolidating enactments of 1915, relating to the Government of India, which also synchronises with the political awakening in the country. The mental and moral impetus given by the claim and the agitation for self-government, the realisation of our fitness for it, the partial achievement of the ideal—considered wholly unsatisfactory by some but certainly disappointing at all events—these and other forces now in the air have inspired us to look closer and deeper into matters of this kind, either for the purpose of claiming what is open to us or agitating for what has been kept from us. It is therefore desirable that the attention of our leading men should be directed to this question and the opinion of the authorities invited upon it, so as to secure a satisfactory and abiding solution of the matter. According to the present constitution of the High Courts, which we have been so far seeking in vain to modify, a legitimate occasion for putting forward a claim of the kind under consideration can but arise rarely. A plea then put forward may be negatived and it would afterwards be too late for agitation. And now, when the Government have conceded to the Indian Vakil the office of Law Member of the Viceroy's Executive Council, it should be easy to persuade them to extend the concession also to the politically less important office of Chief Justice of a High Court.

As early as August 1919, in submitting a memorandum of suggestions to the Secretary of State for India with reference to the provisions which were thereafter to become embodied in the Gov-

ernment of India Act, 1919, the Madras High Court Vakils' Association stated that 'section 101 (4) of the Government of India Act has now made it clear that a pleader of a High Court can be a Chief Justice just as much as a Barrister.' Since then, Mr. S. Srinivasa Iyengar, C.I.E., the late Advocate General of Madras has, in his presidential address to the Madras Lawyers' conference, expressed his opinion that "a vakil has now been made eligible to be a Chief Justice of a High Court", an opinion which in view of the thoughtfulness and legal talents of its author, ought at the very least to secure a respectful hearing even from those who are inclined to take a different view.

The statute of 1915 which, with reference to the provisions relevant to this subject, has been left untouched by the statute of 1919, it is submitted, makes the position clear against any legal requirement that the Chief Justice should be a Barrister. Section 101 sub-section 2 defines the constitution of a High Court and is followed by two provisos the first of which empowers the Governor-General in Council to appoint Additional Judges with the powers of a Judge of the High Court appointed by His Majesty, and the second fixes the maximum number of Judges. This is followed by sub-section 3 which defines the qualifications of "a Judge of the High Court." Then comes sub-section 4, upon the construction of which the question under consideration depends. Section 102 fixes the tenure of office, section 103, the precedence, and section 105 empowers the Local Government to make temporary appointments in vacancies.

Upon these provisions the controversy centres round the construction of sub-section 4 and the question is as to the meaning and effect of the clause "including the Chief Justice but excluding Additional Judges." In the first place, it is submitted that this cannot be construed as defining any qualifications for the Chief Justice. The scheme of the Act supports this view. The qualification for "a Judge of High Court," which expression also comprises within its meaning the person who fills the office of the Chief Justice, has been defined in section 101, sub-section 3. It cannot be said that that clause does not prescribe qualifications for the Chief Justice also ; for otherwise, it would follow that no qualifications are required for a Chief Justice by the statute. The expression 'Chief Justice and other Judges' used in sub-section 2 of section 101 and in section 104, and the provision in sub-section 1 of section 102, defining the tenure of office of a 'Judge of a High

Court' so as necessarily to include the Chief Justice also, strengthen the conclusion. Therefore, if any further qualifications were intended to be prescribed specially for the Chief Justice, we should reasonably expect that qualification to be enacted as part of sub-section 3 itself. In any event, the enactment should be made in section 101 sub-section 2 or a part of the second proviso to that sub-section, but that is not how the statute enacts.

Moreover, the opening language of sub-section 4 referring to a mere mathematical proposition and its place following the clauses fixing first the maximum number of Judges and then the qualifications of a Judge, show that this clause is providing for another important but distinct matter with reference to the constitution of the High Court. Both Barristers and Civil Servants having been declared eligible for appointment in pursuance of a scheme to throw open the office to civilians as well, the statute proceeds to define the minimum proportion as between the Barrister and the Indian Civil Servant *inter se* and with reference to the total strength. The Legislature had dealt with the character and kind of individuals required for a Judgeship and it proceeds to deal herein with the High Court as a whole and its constitution with reference to the various categories of individuals declared competent to compose it and does not have in view any particular office like that of the Chief Justice, as a distinct entity, for consideration.

The arguments above advanced upon the scheme and form of the statute, would show that in this sub-section the legislature was merely fixing a proportion and furnishing a basis for the computation of that proportion. Further, in referring to the inclusion of the Chief Justice, there is no reference to the person filling that office, but only to the abstract office which has to be reckoned as a unit in computation. This is made clear by the language, "but excluding the Additional Judges" now found in section 101 sub-section 4 of the new Act. Surely, the legislature was not enacting in this proviso any qualifications for the Additional Judges, much less the negative that an Additional Judge may not be a Barrister if that can at all be called the prescribing of a qualification. But if the opposite construction were to prevail it will necessarily lead to that result, for, while the assumed construction that the Chief Justice must be a Barrister is derived from the language "including the Chief Justice" a similar construction of the co-ordinate phrase "but excluding the Additional Judges" would be prescribing the qualification that an Additional Judge may not be a Barrister.

Then a reference to the Indian High Courts Act of 1911 makes this position stronger. That Act, for the first time empowered the appointment from time to time of persons to act as Additional Judges. Section 3 of that Act enacts "subject to the provisions...regulating the number and qualifications of Judges, it shall be lawful for the Governor-General in Council to appoint from time to time persons to act as Additional Judges of any High Court for such period not exceeding 2 years, as may be required, and the Judges so appointed shall, whilst so acting, have all the powers of a Judge of the High Court appointed by His Majesty under section 2 of the said Act: Provided that such Additional Judges shall not be taken into account *in determining the proportion* specified in the proviso to that section (the italics is ours). This language which is clear that this proviso only deals with the mode of computing the total number of which the Barrister Judges and the Civil Judges are respectively to form a proportion also proves that the proviso to which it refers—corresponding to sub-section 4 under consideration—equally prescribes only a mode of computation.

Further, the language indicates that the exclusion of the Additional Judges is not from the result arrived at after working out the proportion but in computing the total figure from which the proportion is calculated. The language is "in determining the proportion" i.e. previously to the computation of the proportion and in the process of arriving at the result.

Now, when the provisions of this Act of 1911 were embodied and re-enacted in the consolidating statute of 1915 each part was incorporated in its appropriate place and the proviso with reference to the determination of the proportion by excluding the Additional Judges was incorporated with the proviso in the earlier enactment dealing with the same subject-matter, as it now stands in sub-section 4. While this may even be taken 'as a parliamentary exposition' of the earlier enactments in the High Courts Act of 1861, it gives a sure guide to the interpretation of the clause under consideration. The inclusion of the Chief Justice can, like the exclusion of the Additional Judges, only be for the computation of the total number with reference to which the proportion is to be fixed.

Then, turning to the language of sub-section 4 of section 101 after fixing the proportion of one-third for Barrister Judges, there is the provision that not less than one-third shall be civilians. Now of what total number is this one-third to be? And how is that to be computed? Grammatically the expression "of the Judges including the Chief Justice but excluding the Additional Judges" or the expression "of the

Judges" should be read into the statute a second time for computing the proportion of the Civilian Judges. But, in either view, the result would be anomalous and lead to absurdities. Adopting the same canon of construction with reference to the construction of the second part of the sub-section which deals with the Civilian Judges as with reference to the first part, it would follow that when the entire expression "of the Judges including the Chief Justice but excluding the Additional Judges" is read again into the sub-section, the conclusion is inevitable that the Chief Justice must also be a civilian. He must be a barrister upon the construction of the first portion and he must be a civilian on a like construction of the second portion.

The result is not different if the statute is read repeating only the words 'of the Judges.' To give a consistent meaning, consistently with the express enactment including the Chief Justice but excluding the Additional Judges in the proportion of $\frac{1}{3}$, the word "Judges' must have a corresponding meaning as including the Chief Justice but excluding the Additional Judges. Any other meaning of the word would either contradict the express enactment or make the construction anomalous or lead to inconsistencies in the result in fixing the $\frac{2}{3}$ for the barrister and the $\frac{1}{3}$ for the civilian. But even this meaning would not lead to a sound construction of the sub-section. In so far as the Additional Judges are according to the meaning given to the word "Judges," excluded in arriving at the proportion of $\frac{1}{3}$ itself, they are necessarily excluded in the result arrived at upon that proportion. But, according to the construction supporting the opposite view, which reads the whole expression 'including the Chief Justice but excluding the Additional Judges" as qualifying the word 'one-third' the qualification " excluding the Additional Judges" is also expressly enacted with reference to the result. The consequence is that the express enactment "excluding the additional Judges" has no meaning and wholly superfluous. The expression "including the Chief Justice" would properly be in as being necessary to indicate the qualification of the Chief Justice but not the expression, "excluding the Additional Judges" as that result is otherwise effectuated. Such a construction is opposed to the accepted canons of interpretation, that a statute must be so construed that every word of it has a meaning given to it.

It cannot be contended that, on the basis that the word 'Judges' by its own import includes the Chief Justice and excludes the Additional Judges, the expression "excluding the Additional Judges" is redundant in the sounder construction which makes the expression

"including the Chief Justice but excluding the Additional Judges" relate to "Judges." We have only to remember that, quite apart from want of uniformity of expression in the parliamentary enactments from which different and inconsistent meanings of the word "Judge," can be evolved, the express enactment *including* the Additional Judges in proviso 2 to sub-section 2, of section 101, with reference to the *computation* of the maximum number of *Judges of a High Court*, has rendered the use of the expression "but excluding the Additional Judges" in sub-section 4, quite necessary to avoid a misunderstanding.

Then again, another absurdity results from the contrary construction. According to that construction, as the Chief Justice must be a Barrister, the expression "including the Chief Justice" must be read along with the 'one-third.' But, at the same time, as the Additional Judges have to be excluded from the basis for computation, the expression "excluding the Additional Judges" must relate to 'Judges' with reference to whom the proportion is fixed. Thus two expressions co-ordinate in their grammatical structure have to be given different grammatical constructions for effectuating the result aimed at. This is wholly extravagant and the construction arrived at on this basis can never be considered to be the natural meaning of the section.

Again, as the proviso stands, the participal phrase 'including the Chief Justice but excluding the Additional Judges' qualifies only the word 'Judges.' If a contrary meaning were intended, the legislature would have enacted in the form "one-third (including the Chief Justice) of the Judges, (excluding the Additional Judges) or in some similar form. As it is, it will not be ordinary grammatical construction to read the phrase as qualifying 'one-third.'

It is, therefore, submitted that the intent of the enactment is clear from its language that there is no requirement that the Chief Justice should be a barrister. It will be observed that the opinions quoted in an earlier paragraph refer to the statute as now existing and to the present state of the law, but I do not believe that in the expression of that opinion it was intended to indicate that the law was definitely otherwise prior to the recent statutes. An identical construction would follow from the earlier enactments also and the present Act of 1915 has only made the matter more clear. In any view, the language of the earlier statutes does not in any way militate against the view herein contended for.

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POWERS OF HINDU KINGS WITH RESPECT TO RELIGIOUS AND CHARITABLE INSTITUTIONS.

It is the glory of Hindu law, that its roots are sunk deep into the soil of national life. In the age of Satya and other ages there were no disputes in law, as there are now in the age of Kali (1). When men were bent on doing their duty alone and habitually veracious, there existed neither law-suits, nor hatred, nor selfishness (2). As years went on, men overstepped their own duty named according to their own class or period of life, and behaved otherwise. It was therefore ruled that men, who, overstepping their own duty named according to their own class or period of life, should behave otherwise, should be punished by the king. Persons connected with religious and charitable institutions had to perform certain duties named in the Sastras. Therefore a king must rigorously punish all persons connected with religious and charitable institutions who behave contrary to their special duties, and he must keep them within their own occupations (3).

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(1) सत्यादिषु युगेषु यदा पुरुषा आसन् तदा व्यवहारो विवादो न सूतः, सम्प्रति तु कलौ युगे यथा तदाऽऽह। Vide page 278, No. 5, Vol. III, of the Memoirs of the Asiatic Society of Bengal—The Vyavahâra Mâtrika of Jimutvahana edited by the Hon'ble Justice Sir Asutosh Mookerjee, Kt. C. S. I., etc, (now Acting Chief Justice of Bengal).

(2) धर्मं कृतानाः पुरुषाः सदाऽसन् सत्यवादिनः।
तदा न व्यवहारोऽभून्न द्वेषो नापि मत्सरः॥
Narada, Part I, Chap. I, Vers. 2, S. B. E. Vol. XXXIII, page 5.

(3) यथोद्दिष्टा स्वयं धर्मं स्वधर्मान्नमसंश्रितं।
नैरोध्यवा प्रवर्त्तेत स दण्ड्यो सृजतः भवेत्॥
ये चै स्वधर्मसन्त्यागात् पापं कुर्वन्ति मानवाः।
तपेक्षतस्तान् नृपतैरिदण्डपूर्वं प्रकल्पयेत्॥

The earliest traces of the interference by the king in the management of charitable and religious institutions can be found in Kautilya's Arthasastra.

B.C. 321-296 (1)—Kautilya says: Managers of charitable institutions shall send informations to Gopa or Sthanika as to any heretics (Pashanda) and travellers arriving to reside therein (2) * * * *

The Superintendent of religious institutions may collect in one place the various kinds of property of the gods of fortified cities and country places and carry away the property to the King's treasury (3).

Beyond these texts of the Arthasastra, there seems to be no authority regarding the jurisdiction of the ancient sovereigns over religious and charitable institutions, before the age of Asoka. Because, it was during his reign that the statutory law on the subject was promulgated for the first time. On or about the year 273 B.C. Asoka-Vardhana or Asoka, as he is generally called, undertook the government of the vast empire (4). His solemn coronation did not take place before the year 269 B.C. about four years after his accession.

In 257 B.C. Asoka instituted quinquennial official progresses for the propagation of Law of Piety (Dharma), and dedicated cave-dwellings at Barabar for the use of Ajivikas. In 256 B.C. he appointed Censors of the Law of Piety (Dharmamahamatrah). In

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तथाद्राक्षप्रवर्गेण सर्व्वे वर्षाः सवर्षतः।
प्रवर्त्तन्तेऽन्यथा दृष्ट्वा; एषा पार्थेन सवर्षतु॥

Vide Chap. XXVIII, Vers. 35-36, page 143 of Bangabasi edition of 1316 B. S. of Mârkandeya-purana. For English translation, vide page 151 of F. E. Pargiter's editon, 1984, of Bibliotheca Indica Series. See also page 278 of the Vyâvahara-Mâtrika :-"वर्षं नष्टे मनुष्याणां यात्रा दृष्ट्वर: कृत:।"

(1) The researches of the German Scholars have clearly established that the Arthasastra is a genuine ancient work (*echt* and *alt*) of Maurya age, and presumably attributed rightly to Chanakya or Kautilya. Vide page 153 of Vincent A. Smith's Early History of India, Ed. 1914.

(2) वर्षावग्रहिण: पाषण्डिपार्श्वेकालादेय वासयेयु:। Vide page 144, कौटिलीयं अर्थशास्त्रं, edited by R. Shama Sastri, Ed. 1919. (Oriental Library publications by the University of Mysore). For English translations, vide page 181 of R. Shama Sastri's English Edition (1915).

(3) देवताध्यक्षो दुर्गराष्ट्रदेवतानां यथाग्रसंभावं कोशं कुर्य्यात्। तथैव चाहरेत्। Vide, page 244, कौटिलीयं अर्थशास्त्रं। For English translations, vide R. Shama Sastri's English Edition (1915) page, 304.

(4) Vide Vincent A. Smith's Early History of India, page 196.

242 B.C. he published the complete series of seven Pillar Edicts. The Seventh Pillar Edict (1) runs as follows :—

I. Thus says the Gods' Beloved Gracious King—An interval is past since there were kings and wished how the Law would spread among the people. But there has been no adequate spread of the law among the people.

II. Thus says the Gods' Beloved Gracious King on this—This has occurred to me. An interval is past since kings did wish how the Law would spread among the people and no adequate spread of the Law has there been among the people. How then will the people be convinced? How will there be an adequate spread of the Law? How among whom shall I increase the spread of the Law?

III. Thus says the God's Beloved Gracious King on this—This has occurred to me—Let me preach sermons of the Law and let me give teachings on the Law. The people will be convinced

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(1) देवानं पिये पियदसि लाजा हेवं आहा मे अतिकंतं।
अंतलं वाजामि वुसु हेवं वेदिसु जनं अलं।
धंमवढिमा वढे वा सी पु अलं अनुसुपावा धंमवढिया।
वढिया एतं देवानं पिये पियदसि लाजा हेवं आहा एस मे।
कटा अतिकंतं च अंतलं हेवं वेदिसु जनमे वुसं अलं।
अनुसुपावा धंमवढिया वढे याति सी च अलं अनुसुपावा।
धंमवढिया वढिया से किंसु सुजमे अनुपटि पजेया।
किंसु सुजमे अनुसुपावा धंमवढिया वढे याति किंसु सुआनि।
अंतु वाल मेव धंमवढियाति एतं देवानं पिये पियदसि लाजा हेवं।
आहा एस मे कटा धंमसावनानि सावापयामि धंमानुसथिनि।
अनुसासामि एतं अलं सुतु अंधपटीपजी सति अंधुवंसि सति।

१। धंमवढिया च वाढं वढिसति एतामे मे अठाये धंमसावनानि सावापितानि धंमानुसथिनि विधियानि आनपितानि वधा मे पुलिसापि वहुके जनसि आयुतं एते पलिवा वहिसंति पि पविवधिसंति पि जनपदापि वहुकेसु पानसतसहसेसु आवुता ते पि मे आनपिता हेवं च हेवं च पलिवोवदाव।

२। अनं धंमयुतं देवानं पिये पियदसि हेवं आहा एतं एव मे अनुपेखमाये धंमयमानि कटानि धंमनहामाता कटा धंमसावने कटे देवानं पिये पियदसि लाजाहेवं आहा मवेसु पि मे निजोढानि छोपापितानि हावोपवानि छोसंति पसु सुनिसानं धंमावढिया छोपापिता वढवो सिंधानि हि मे वहुपानानि।

३। खनना पापिताति निसिविया च लावापिता। आपानानि मे वहुकानि तत तत लावापितानि पटि मीवामे पसुसुनिसानं वहुके पु एस पटिमोवे नाम वितिवाती हि सुखावनाया

on hearing these. They will improve and there will be a steady spread of the law. For this purpose sermons on the Law have been preached and many teachings on the Law have been ordered. I have ordered my men too among the people so that they might preach and expound. Princes too ruling over many hundred thousand lives have been ordered " say thus and thus to the officers of the Law."

IV. Thus says the Gods' Beloved Gracious King. Perceiving this indeed I have made pillars of the Law, have appointed great ministers of the Law and have made proclamations on the Law.

V. Thus says the God's Beloved Gracious King. On the roads I have had Banyans planted so that they might offer shade to beast and to man. I have had mango groves planted and have had reservoirs dug at every half a mile. I have had rest-houses and numerous troughs made here and there for the enjoyment of the beasts and men. But that enjoyment is a trifle. For the preceding kings as well as I have made the people happy in many ways. May the people pursue this course of the Law. For this purpose, I have done this.

VI. Thus says the Gods' Beloved Gracious King. I have employed the great ministers of the Law in many kind acts. They are employed among the hermits, the house-holders and all the religionists. Appointed by me they are employed in the interest of the Church too. Appointed by me they are employed among the learned and the mendicants too. Appointed by me they are employed among the naked hermits. Appointed by me they are employed among the various religionists. Receiving their various duties the numerous great ministers of the Law are emoloyed by me among these and also among all other religionists.

पुत्रिमे हि पि चातीहि समवा च सुखयिते लोके इमं चु धम्मानुपटोसतो अनुपटोपयन्तु ति एतदथा मे।

४। एसकटे देवानं पिये पियदसि राजा धम्ममहामातापि मे ते बहुविधेसु अठेसु अनुवटिकेसु विवापटासु पवजीतानं चेव निहितानं च सवपासण्डेसुपि च विवापटा से संवुटसि पि मे कटे इमे विवापटा लोकहितसि इमेव वासलेसु आलोधिकेसु पिमे कटे।

५। इमे विवापटाति लोकहितसि निगण्ठेसु पिमे कटे इमे विवापटा लोकहिता नानापासण्डेसु पिमे कटे इमे विवापटा लोकहितसि। पटि विसिठं पटीविसिठं तेसु तेसु ते ते महामाता धम्ममहामाता चु मे एतेसु चेव विवापटा सवेसु च अंनेसु पासण्डेसु देवानं पियस पियदसि राजा इमं आहा।

६। एति च अंमे च बहुका मुखा दान विसगसि विवापटा मे मम चेव देविनं च सवसि च मे ओलोधनसि ते बहुविधेन आकालीन तानि तानि तुठायतनानि पटीपादयति हिद चेव

VII. Thus says the Gods' Beloved Gracious King—These and many other chief officers are concerned with charities and gifts mine and the queens' and also in all my harems. They perform their duties satisfactorily in many ways. Here and in the provinces these officers employed by me are concerned with the charities and gifts of my sons and of the other queens' children for the performance of the Law and belief as the Law is but consideration as to how kindness, charity, truthfulness, cleanliness, happiness and goodness will increase among the people.

VIII. Thus says the Gods' Beloved Gracious King—The people accept and follow what virtuous acts I have done. Thus has increased and will increase hearkening to mother and to father, hearkening to the elders, respect for the old, the learned, the hermits, the miserable and the poor and kindness to the slaves and the servants.

IX. Thus says the God's Beloved Gracious King—This spread of the Law that has been among the people is based on the restrictions under the Law under contemplation. The restrictions are unimportant in the matter. Contemplation is superior. This is a restriction under the Law that has been made by me, (e.g. such and such animals ought not to be killed.) I have made other restrictions under the Law. But it is by contemplation that there has been an ample spread of the Law among the people resulting into the preservation of beings and avoidance of life-killing. Done for this purpose, be this continued by my children and grand-children and may endure till the Moon and the Sun last and may the people follow this. For those who follow this will have secured welfare

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दिसासु च दासभतकंसि पि च मे कटे अंगानं च देवि कुमाभानं देसे दानविसगेसु विधापटा होहन्तिति।

७। धम्मपदालठावे धम्मानुपटिपतिये एस हि धम्मापदाये धम्मपटीपति च या देवं दयादाने सचे सोचये मदवे साधवे च लोकसहितं वढिसतिति देवानं पिये पियदसि लाजा देवं आहा यानि हि कानि चि मनिसा संघयानि कटानि ते खोये अनुपटीप्पमे ते च अनुविधियन्ति तेन वढिता च।

८। वढिसन्ति च मातापितिसु सुसुसायानुसु सुसुसाया बम्होमहाभभानं अनुपटीपतिया बामनसमनेसु कपनवधावेसु आव दासभटकेसु चन्पटीपतिया देवानं पिये पियदसि लाजाहेवं आहा सुनिसानं च या देवं धम्मवढि वढिता दुवेहि येव आकाहि धम्मनियमेन च निझतिया च।

९। तत चवहे से धम्मनियमे निझतिया च सुये धम्मनियमे नथी एस थे मे देवं कटे

here and hereafter. Being bathed as King for twenty-seven years, I have had this Law Edict written.

X. Thus says the God's Beloved—Wherever this Law exists, stone-pillars and rocks should be had so that it may have a long duration.

350 A.D. The Smriti of Yajnavalkya ranks chronologically next only to this Royal Proclamation so far as the present point is concerned. Yajnavalkya says :—

A king can reduce to slavery a Sanyasin who is guilty of incontinence, till he is dead (1).

The Dharma Sastra of Narad which agrees on many points with the Smriti of Yajnavalkya and reflects a more developed stage of jurisprudence states the same thing in almost a similar language (2).

A charitable or religious institution is a Gana or a public body (3) and it is therefore governed by the rules of the Hindu law relating to the 'transgression of Compact.'

Yajnavalkya in dealing with the title 'transgression of Compact' says that these rules should be followed amongst guilds, Naigamas, heretics and Ganas (4).

The rules relating to the 'transgression of Compact' are as follows :—

हंसानि च हंसानि जातानि भवविसानि थंभानि पिंसु वडुकानि धंमलिपमानि वानि मे अटानि निखतिमा व पु सुये सुतिसानं धंमवढि वढिता अविहिंसाये सुतानं।

१०। अलाधंमाये पातानं मे एतये धंमाये हंसं अटे पुतापपोतिके चन्दमसुखिविके होतु ति तधा च अनुपटोहजनु ति हंसं हि अनुपटोपधंमं छिदत पाखंडे आखधे होति सतविसति वसाभिसितेन मे हंसं धंमाखिधि लिखापापिताति एतं हंसानं पिये आखा हंसं।

११। धंमखिधि भव अधि सिखाधंथानि वा सिखाफलकानि वा तत अटविया एव एस ठितिठितिके सिया। Vide Piyadasi Inscriptions edited by Ramavatara Sarma, Patna p. 37. Vide also Vincent A. Smith's Asoka p. 190.

(1) Yajnavalkya Smriti—published by Nirnayasagar Press,—Bombay 1909-p. 250: प्रव्रज्यावसितो राज्ञो दास आमरणान्तिकम् Chap. 2, Vers. 183.

(2) राज्ञ एव हि दासः स्यात् प्रव्रज्यावसितोनरः। Chap. V, Vers. 35 S. B. E. Vol. 33, p. 137.

(3) Vide Mr. D. R. Bhandarkar's Carmichael Lectures.

(4) एषो हि लौकसमयस्य यथालाभसमयं विधिः। Chap. 2, Vers. 192, Yajnavalkya Smriti, page 253. Vide Narada Chap. X Vers. 2; S. B. E. Vol. 33, page 153.

Vide also Dr. Romes Chandra Majumdar's Corporate Life in Ancient India, page 142: Three Essays by Rai Rajendra Chandra Sastri Bahadur, M.A., page 25.

Having made suitable houses in his city, the king should make the Brahmanas settle there. And having granted them stipends for learning the three Vedas, he should say—"Follow your own vocation."

He following, without any hindrance, his own vocation, should, with care, satisfy those which time brings on, as well as those imposed on him by the king.

He who robs the wealth of the villagers or breaks the established custom of the society, should be banished from the kingdom, after having been stripped off all his possessions.

All should follow the words of persons who speak in the interest of a public body. He who acts, otherwise, shall be punished with the first form of penalty.

The King should finish the business of persons who approach him in the interest of a public body and send them away after having honoured them with gifts and other marks of royal favour. Whatever a person, sent out by a public body, on a public work gets, he must make it over to that body. If he himself does not give it, he must be punished with eleven times the amount.

Persons conversant with Vedas, pure-minded and shorn of avarice, should be placed at the head of a public body to administer its affairs. All should follow the words of those persons speaking in the interest of a public body (1).

Let us now look into the Sanskrit Dramas which depict a picture of real life of the ancient IndoAryans.

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(1) राजा कृत्वा पुरे स्थानं ब्राह्मणानस्य तत्र तु ।
त्रैविद्यं वृत्तिमद्दत्वात् स्वधर्मैः पालयतामिति ॥
निजधर्माविरोधेन यस्तु सामयिको भवेत् ।
सोऽपि यत्नेन संरक्ष्यो धर्मो राजकृतश्च यः ॥
यच्चद्रव्यं हरेद्यस्तु जनिदं जनभेद च यः ।
सर्वस्वहरणं कृत्वा तं राष्ट्राद्विप्रवासयेत् ॥
कार्यैश्यं वचनं सर्वैः समूहस्थितवादिनाम् ।
यस्तत्र विपरीतः स्यात् स दाप्यः प्रथमं दमं ॥
समूह कार्य्यं भाषातान् कृतकार्य्यान् विसर्जयेत् ।
स दानमानसत्कारैः पूजयित्वा महीपतिः ॥
समूहकार्य्यप्रहितो यद्यमेत तदर्पयेत् ।
एकादशगुणं दाप्यो यदसौ नार्पयेत् स्वयं ॥
धर्म्याणाः सर्वतोऽनुज्ञा भवेयुः कार्यचिन्तकाः ।
कार्यैश्यं वचनं तेषां समूहस्थितवादिनाम् ॥

Vers. 185—191, Chap. II, Yajnavalkya Smriti, p. 251.

A. D. 413-455. The greatest of Indian Dramatists is Kalidasa and the finest of Kalidasa's plays is Abhijnana Sakuntalam; the hero is Dushyanta, a celebrated king of ancient days, the heroine Sakuntala the daughter of a celestial nymph, Menaka. After the prelude, in which an actress sings a charming lyric on the beauties of Summer time, King Dushyanta appears pursuing a gazelle in the religious institution of which the sage Kanva is at the helm. Here he catches sight of Sakuntala, who, accompanied by her two maiden friends, is engaged in watering her favourite trees, when a bee was flying at her face.

Sakuntala says :—

This impertinent bee will not desist. I will go elsewhere (going a few steps and glancing round). How now here also it comes. My friends, deliver me from the attack of this ill-behaved bee.

Both the companions (smiling): Who are we to deliver you? Call Dushyanta (to your aid). The religious institutions are to be protected by the King (1).

Seizing an opportunity of addressing Sakuntala, the king is just thinking whether he will make himself known to the beautiful girl.

King (aside): How shall I make myself known and shall at the same time disguise myself? Well, let me tell her in this way. I am the person charged by His Majesty, the descendant of Puru, with the administration of justice and religion; and I am come to this sacred forest to know if the rites of the hermits are performed without obstruction (2).

It is clear from the passages quoted above that the Hindu Kings as a matter of fact exercised supervision over charitable and religious institutions of the empire.

Vide Manu Smriti, Chap. VIII, vers. 219-220. Published by Nirnayasagar press, Bombay, Ed. 1837 Sakábda, page 307: Vivadchintamani published by Venkateswar Press, Ed. 1820 Sakábda, page 82: J. R. Gharpure's Smritichandrika, Vyavahara Kanda, page 332, Ed. 1917. Vyavahara Mayukha—Benares Edition, 1879—page 89: Viramitrodaya—Vyavaharadhyaya—Edited by Jibananda Vidyasagara, 1875—page 433.

(1) राज्ञ खलिद दण्डार्हं तपोधनानाम्। अभिज्ञानशकुन्तलम्। Act I, vide page 13 Bidhubhushan Goswami's Edition, 1916.

(2) भवति यः पौरवेय राजा वर्णाश्रमाधिकारे नियुक्तः सोऽहं

अधिज्यधन्वीनखलाय वर्णाश्रमाभिसमाशंसः।

अभिज्ञानशकुन्तलम्, page 16.

The Hindu Kings had ministers of charitable works for such superintendence. We find in Viramitrodaya : (1).

"Some hold that the term Yogakshema means persons who perform sacrifices and charitable works as the King's minister (of charitable works) the (family) priest and the like."

That the Hindu Kings as a matter of fact exercised supervision over Hindu religious institutions will also be clear from numerous historical records (2).

In an inscription evidencing the treaty made between Raja of Cochin and the Dutch East India Company, it is stated among others :—

As we are obliged to protect individually the temples of Palaynnur, Tiruvallamale etc., we should do so in a regular manner (3). Again, in the inscription No. IX. styled as the Srivilli pâthur plates of Abhirama Pandya, the following Sanskrit passage is found :—

दानपालनयोर्मध्ये दानात् श्रेयोनुपालनम् ।
दानात् स्वर्गमवाप्नोति पालनात् अच्युतं पदम् ॥

"Of the two, gift and protection
protection is superior. By gift one
attains heaven, but by protection the
imperishable (immortal state)"...(4)

In an earlier passage we find the King Abhirama summoning the learned and asking them "whether gift or protection is better." The answer was "protection, O, Pandya King is superior in this world than gift." (5)

That Kings interfered when there were disputes regarding religious matters will also appear from Nelson's Madura Manual(6). Their Lordships of the Judicial Committee referring to this Manual in *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (7), say :—

There can be little doubt that this superintending authority was exercised by the old rulers.

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(1) Vide Golap Chandra Sastri's translation, page 250.

(2) Vide P. R. Ganapathi Iyer's Law relating to Hindu and Mahomedan endowments. Ed. 1918 page 23 : vide also Subramania Iyer's ancient Dekhan, Bk. V., pp. 345 to 350.

(3) Travancore Archæological series, Vol I, No. III, page 11.

(4) Group VI. page 113.

(5) Travancore Archæological Series, Vol. I, Group VI, pp. 108, 109 and 113.

(6) Part III, Chap. VIII page 162.

(7) (1874) L. R. 1 I. A. 209 (233).

The Hindu Rulers interfered in the management of charitable and religious institutions when they found that the managers had abused their powers. This was the law centuries before the birth of Christ: and this was the law when the British first came to occupy India. Because, inspite of successive waves of invasion and conquest by Persians, Greeks, Scythians and Mahomedans, the national development of the life and law of the Indo-Aryan race remained practically unchecked and unmodified from without down to the era of British occupation.

Kshitis Chandra Chakrabarti,
Vakil, High Court.

NOTES ON CASES.

1909.

2 Cr. App. Rep. 160
In re
Henry Markham.

Pending charges known to the Police—if to be mentioned to the Court upon the first conviction—One comprehensive sentence :

M was convicted of obtaining £ 50 from Miss. P by false pretences. M offered to marry Miss. P who advanced £50 on M's representation that he was purchasing a boarding-house by means of which they would carry on business after marriage. On the day of wedding M was not found In 1908 M was sentenced to 12 month's rigorous imprisonment.

On his release in 1909 he was rearrested on another offence which was committed in 1907 but about which the police failed to inform the Court in 1908 On the second charge M was sentenced to 18 months' rigorous imprisonment.

On appeal the Court reduced the sentence to 6 months' imprisonment with hard labour on the ground that all pending charges against a defendant should be mentioned to the Court upon the first conviction with a view to their being disposed of by one comprehensive sentence and that a prisoner should have a "Clean sheet,' when he comes out of prison.

In re Syres (1) followed.

N. C.

(1) (1908) 1 Cr. App. Rep. 172.

UNIVERSITY OF LIBRARY. LAW COLLEGE.

The Hon'ble Sir Asutosh Mookerjee, Kt.

Acting Chief Justice of Bengal.

Again history affords instances to show that there existed similar special Courts for the trial of commercial causes also in France, Germany, Spain and Italy in the days of the existence of English Piepowders and Staple Courts run very much on the same footing as those.

It needs not be too much impressed that on account of the isolated character of the commercial Courts and the law as administered by them, the King's Courts were always jealous of their commercial rivals. So when in the 18th century improvement occurred with transport facilities and speedy means of communication, when commodities began to be locally produced and wealth of the masses increased, periodical fairs and markets bringing in the advent of merchants from abroad began to fall into disuse and the administration of business law slowly and gradually was absorbed by Judges of the King's Courts who had had no previous training or sympathy with their novel task (1). This meant, in other words, gradual abolition of the early commercial Courts, administering the Law Merchant or Market Law, having been replaced by the King's Courts, administering Common Law and the ultimate triumph of Common Law over the old Commercial Law. The exclusive nature of the commercial Courts also amply accounts for the facts that, although there had been abundant decisions in those Courts, they never found their way into the Year-Books or early reports, by reason of the fact that the latter dealt with cases arising exclusively in the King's Courts dealing with Common Law and could not, therefore, take notice of such as treated of Law Merchant.

Praphulla Chandra Ghosh.

(1) Jenk's Short History of the English Law, pp. 40 and 75.

of fair trade and equal opportunity,(1) thereby suggesting that the midæval monopolies, modern trusts and profiteering were things not at all countenanced in those days. And it appears that the law against forestalling, regrating and ingrossing had had also statutory support. (2)

On similar lines as the Piepowders Courts there were the Staple Courts attached to certain industrial centres (3) in which the foreign trade in wool, leather and other standard commodities was carried on, having general civil and criminal jurisdiction and administering the same Law Merchant as was done by the former kind of Courts. The latter Court had jurisdiction over all manner of contracts and covenants between merchant and merchant or other, whether the contract was made within the area of the Staple or outside it.(4). A statutory recognition of the institution was received in the reign of Edward III by the Statute of the Staple (5), which defined the authority and jurisdiction of the Court with particularity. It was enacted, amongst other things, by the statute "because that merchants cannot often long tarry in one place in hindrance of their business we will and grant the speedy right be to them done from day to day and hour to hour according to the law of Staple." The King's Justices had no part or lot in either of the Courts and they therefore looked upon them with feelings of distrust and suspicion.

From the foregoing account it becomes directly evident that the system of judicial administration as meted out by the two courts betokened speedy disposal of proceedings and quick despatch of business constituting great saving of time, worry and annoyance, a state of things so eagerly sought for by the trading community everywhere and at all times.

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1. "Forestalling, ingrossing and regrating was the offence of buying up large quantities of any article of commerce for the purpose of raising the price. The forestaller intercepted the goods on their way to market and bought them up so as to be able to command what price he chose when he got to the market. The ingrosser or regrator—for the words had much the same meaning—was a person who, having bought goods wholesale, sold them again wholesale. This was regarded as a crime." Stephen, *History of the Criminal Law of England*, vol. iii, p. 199.

2. See 25 Edw. III, stat. 4, c. 3 (1350) and 5 and 6 Edw. VI, c. 14. This statute and five other acts were repealed in England in 1772 by 12 Geo. III, c. 71 and in 1844 stat. 7 and 8 vict. c. 24 has abolished the offences. But this is not strictly so. They were offences against the market and it is the extent of the latter and the forms of business that have changed.

3. Coke's Institutes, pt. 4, ch. 46.

4. Ibid.

5. 1353, 27 Edw. iii, st. 2.

use alike of merchants and lawyers. The old English Admiralty Courts administered the latter class of law in days of yore.

We learn from sources too authoritative to be disputed that in the ancient and middle ages in the simpler conditions of society that then existed business was carried on at stated periods in fairs and market-places and maintained a sort of arrangement which admitted of close supervision and accomplished at the same time many of the purposes of modern advertising. To every fair there was attached a Court of Piepowders (lit. dusty-foot, perhaps so called from the dusty feet of suitors who resorted to it(1). This court which was, as described by Lord Coke, "the lowest, and at the same time the most expeditious Court of justice known to the law of England was a Court of Record"(2), in which the Law Merchant was administered in a rough and ready way by the Steward of the Fair with the assistance of merchants who went there, (3) and which originally and for a long time afterwards had jurisdiction over all matters occurring within the fair or market, without limitation as to amount, civil as well criminal, and between denizens as well as foreigners.(4) In the fulness of power, be it noted, it "was one of the most active and most widespread of all tribunals formerly existing in England and formed a separate organic unit in the judicial system of the realm.(5) As attachments were then and there returnable and pleas might be adjourned from hour to hour, either there was a continuous session daily from eight or nine A.M. until sunset, if necessary, or there might be one session in the morning and one in the afternoon(6). One of the most salient features of the institution was the administration of justice expeditiously among the variety of persons that resorted from distant places to the fair or market. Another redeeming feature thereof was that the law as administered by the Court prohibited "forestalling, regrating and ingrossing" in the interests

1. Some thought that the word was derived from the French *pied puldreaux* (a pedlar) and meant a court of such petty chapmen as resort to fairs and markets; Coke's Institutes, pt 4, ch. 60.

2. Blackstone's Commentaries, bk. 3, ch. 4, pp. 33 and 34.

3. Coke's Institutes and Blackstone's Commentaries, *supra*; also see the Select Cases on the Law Merchant (Selden Society) for many instances of the declaration of the law by, and other activity on the part of, merchants at the Fair Court of St. Ives.

4. See the Introduction to Select Cases on the Law Merchant (Selden Society)

5. Select Cases, *supra*, Introd., p. xiv.

6. *Ibid.*, p. xxiii.

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SOME SIDELIGHTS INTO THE ADMINISTRATION OF EARLY ENGLISH COMMERCIAL LAW.

That since the dawn of history different races and nations have had commercial dealings and intercourse with one another in the face of immeasurable distances, insurmountable barriers and insuperable difficulties needs not now be gainsaid. It would perfectly be natural to suppose, therefore, that rules distinct and separate from those fixed, formal and personal relations of society, such as govern estates in land, succession and domestic relations, must have governed all business relations in particular in those times. Such rules were in fact a collection of usages, practices and precedents regulating all business transactions and had actually been observed in practice from very remote ages, notwithstanding the fact that the persons with whom such business dealings were conducted had universally been recognised as natural enemies and fit objects of spoliation. The law which prevailed in the Courts in those times may be said to have contained the germs of the modern Law Merchant and was then quite distinct from Common and Statute Laws. But it must not be supposed for a moment that the Law Merchant which governed business affairs during the ancient and middle ages suggested merely the law of bills and notes just as is denoted by the too extensive term Commercial Law at the present day. There were then two main aspects of the law in question, namely, the Law Merchant and the Law Maritime. Between the two all mercantile and business transactions, inland and maritime, were covered in those olden times. The Law Merchant consisted of a body of legal principles founded on the customs and practices of traders and merchants in their dealings with one another and was wholly different from Common Law. The Law Maritime was a collection of usages and customs prevailing in the sea-coast towns, drawn from the ancient sea-laws and maritime codes, made by the ancient Greek, German and Spanish Emperors in the days of their commercial glory, for the

The Chief Justice replied that his learned brothers and he associated themselves with every thing which had fallen from the three gentlemen who had spoken. Personally he had not the privilege and advantage of Mr. Bose's personal acquaintance but it was accepted on all hands that both in his private and his professional life, Mr. Bose's example was admirable. One of his learned brothers had informed him that in addition to Mr. Bose's numerous good qualities there was one perhaps which was more marked than any other. That was that on no occasion was Mr. Bose known to lose his temper, no matter however trying the circumstances might have been. Their Lordships desired to join in expressing to the members of his family their most sincere sympathy in their great loss.

and the society. One cannot conceive of a man, like Robinson Crusoe, living outside society, committing a crime. It is only, when one individual's interests clash against another or other individuals' interests, as Herbert Spencer points out, that there is possibility of a crime. In a perfect society, such as that dreamt of by Herbert Spencer and others, where the individual interest is identical with the social interest, there is no possibility either of crime or immorality. We must take it, then, that the notion of crime is purely 'sociologic.'

Sitaram Banerjee, M.A., BL,

(*To be continued.*)

LATE BABU NILMADHAB BOSE.

The Vakil's Association has lost its oldest practioner in the death of Babu Nilmadhab Bose on the 4th of February, 1920. He was 86 years of age and had been practising since 1860. Babu Nilmadhab occupied a foremost position in the bar and was loved and respected by all who came in contact with him. He retired from practice in 1916. We deeply mourn his loss and beg to offer our sincere condolence to the bereaved family.

On Friday, the 6th instant all the Judges of the High Court assembled in the Chief Justice's Court room when reference was made to the death of Babu Nilmadhab Bose.

The Advocate-General said that the late Mr. Bose was born in 1834 and was educated at the old Hindu College and was a favourite pupil of Captain D. L. Richardson. He became a Vakil in June 1860, and joined the Alipur Bar of which he became the leader. In 1871 he began to practise in the High Court and obtained a foremost position at the Bar. He was held in high esteem by both Bench and Bar and while strictly Oriental in manners he was orthodox in his faith and assimilated what was best in the Western system of culture. His command of the English language was admirable and almost unique while he was a man of the highest culture and his legal erudition was profound. He left a large family to mourn his loss.

Babu Dwarka Nath Chakravarti on behalf of the Vakils and Babu Kali Nath Mitter for the Incorporated Law Society endorsed what had fallen from the Advocate-General.

James Martineau observed long ago, these two sentiments are to be placed at the top of the springs of human action (s). We generally look upon the sentiment of benevolence as a virtue rather than as a duty and surely it would be absurd to call an individual a criminal because he happens to be wanting in the virtue of benevolence. With regard to the sentiment of justice, it should be observed that it is one of the most complex of human sentiments and to call it fundamental is nothing short of a psychological error (t). Garofalo tries to modify his statement by saying that an individual—if he wants to keep himself outside the circle of criminality—is expected to possess these two sentiments in an average degree. But the "average degree" is nowhere defined and really no definition seems to be possible. Further, as Professor Ferri points out, there are other moral sentiments, such as patriotism, which would appear to be as fundamental as benevolence and justice. On these grounds, therefore, Garofalo's definition of natural crime as "An offence against the fundamental altruistic sentiments of pity and probity in the average measure possessed by a given social group," which arises out of an analysis of what he calls the fundamental moral sentiments, must be characterised as imperfect and incomplete. The definition satisfies neither the classical school nor the positivistic school; the former are dissatisfied because, as De Quiros pithily remarks, "The decalogue is reduced to two commandments: Thou shalt not kill (pity) and thou shalt not steal (probity)" (u); it fails to satisfy the latter because, as Enrico Ferri observes, it is not necessary to define 'Natural crime' as that is the only category of crime with which a positivist deals. Be it observed, however that although, I can accept, neither Garofalo's definition nor his method of arriving at it, I am in entire accord with him in so far as he advocates the idea of "Natural crime" as distinguished from "Artificial or statutory crime." This I take to be Garofalo's most valuable contribution to the science of criminology and it is as well to point out, at the outset, that the outlines of the science which I propose to develop herein are based upon this fundamental distinction.

Sentiments of Benevolence and Justice—Complex Sentiments,

Garofalo's conception of 'natural crime' accepted.

It is necessary, however, to point out, here, that the conception of "Natural crime" is not an eternal and immutable Platonic concept. A crime arises only through the interaction of the individual

Notion of crime, sociologic.

(s) Types of Ethical Theories.

(t) According to Herbert Spencer, whom Garofalo follows, these moral sentiments are the latest products of psychic evolution.

(u) De Quiros 'Modern Theories of Criminality,' p. 30.

against the position I have maintained above. It may be argued that what we call crimes to-day were not regarded as crimes at certain places and at certain epochs, how, then, could the commission of those acts (which were not crimes then, but are regarded as crimes now) produce any corresponding organic and psychic changes? The objection, be it noted, is based on a misconception. It is not contended that the mere fact of the commission of acts like these would produce any changes. Everything would depend upon the motive and the mental state from which these acts proceeded. A man might commit a murder from the loftiest motives of patriotism or from motives of cupidity or revenge or passion. It is the controlling motive that would determine his mental state and so may or may not produce, as the case may be, those organic and psychic traits which are regarded as the concommitants of a criminal mind. Further, we must not lose sight of the fact, that in primitive times, whatever the social and political sanctions might have been, acts, which we now condemn as crimes, used to be committed from various motives. There were parricides and infanticides from a mistaken sense of duty as well as from motives of cupidity or motives of jealousy or with a view to hide one's dishonour. It is the latter only who must have developed the characteristics which, to-day, we associate with criminality, for it is a well-recognised fact that a man might have grossly violated the provisions of the penal code without being a true criminal as much as a man, who has always scrupulously observed and lived within the limits of the law of the land, may be regarded as a potential criminal.

the fact that the notion of criminality being variable it could not have produced the organic and psychic changes.

Answer to the objection.

The controlling motive determines the changes.

Same act may be committed from various motives.

I may take it as established, then, for our present purpose that the cause of a crime is not the inscrutable fiat of the individual will and further, that it is possible in the case of born criminals, to delineate their organic and psychic characteristics.

What, then, is the nature of crime and what are its causes? In order to define the real nature of crime, Garofalo begins by an analysis of what he calls the fundamental human sentiments and comes to the conclusion that the two fundamental sentiments are those of benevolence and justice (r) and any violation of either of these sentiments leads to what he terms, "Natural Crime" as distinguished from "Juridical Crime." The analysis and consequently the definition that arises out of it are incomplete. The sentiments referred to, it should be observed, are highly complex and are to be found only in the best organised human nature. In fact, as Dr.

Garofalo's "natural crime."

Garofalo's psychological analysis imperfect.

(r) Garofalo's Criminology, p. 19.

Dr. Lombroso's explanation unsatisfactory.

also be borne in mind that these characteristics are found in born-criminals, and not in occasional criminals. Dr. Lombroso would explain the existence of these features by the theory of atavism but to my mind the explanation is not satisfactory. The savages, as a rule, are not always criminals or criminally-inclined. In fact, those who have observed the Kolls of Chota-Nagpur, the Santhals, and the Bhills of Rajputana will bear testimony to the fact that there are few people more honest, more truthful and more hospitable. The law courts of our country, it is well known, seldom disbelieve the oral evidence of these people. Further, the physical and the anatomical characteristics of these savages would belie their criminal character. The true explanation, it seems, will be found in the Laws of Evolution and Heredity. Whenever a violent crime is committed, there is a corresponding anti-human or anti-social feeling, *e.g.*, anger, jealousy, greed, etc., in the mind. These feelings produce certain definite nervous modifications which are transmitted from generation to generation and which manifest themselves in the individual as insanity, criminality or epilepsy. This does not imply, of course that the child of a criminal will necessarily be a criminal or will show the physical and anatomical marks of criminality because, as we know, the law of heredity is modified a good deal by the law of variation. Further, it should also be observed, that even if all the marks of a criminal are present, actual commission of crime need not necessarily follow. Thus, as Professor Ferri observes "Now, some men will deny the existence of this clinical type, because a born-consumptive fortunate enough to be rich and able to live in an hygenically favourable environment reaches an advanced age without dying of tuberculosis. It is the same with the criminal type. The individual, who from birth, by hereditary transmission carries in his organic and psychic constitution this junction of anomalies, is pre-disposed to crime. He may, if he has the good fortune to live in an exceptionally favourable medium, die without having ever violated the penal code, but he will, on the contrary, fall into natural criminality if the conditions of his environment make his struggles for existence difficult" (*q*). I conclude, therefore, that the organic and psychic characteristics acquired by the primitive criminals have been transmitted through generations and they imply a predisposition towards criminality which materialises in a favourable environment.

True explanation to be found in the Laws of Evolution and Heredity.

What the law of heredity implies. Operations of the law modified by the law of variation.

and by Environment.

Objection based upon

But there is one rather serious objection that may be brought

(*q*) Criminal Sociology, p. 96.

pose, therefore, to indicate here the broad outlines of the arguments for and against the existence of the "criminal type." It has been observed that certain well-defined classes of criminals, murderers and thieves, for example, have certain characteristics—physical, physiological, anatomical and psychical—which are quite definite and well-marked. Thus, Dr. Lombroso, who among the modern criminologists observed the largest number of criminals and who always attached the greatest importance to what he called the "atavistic traits" sums up the result of his study in his 'Criminal man,"

Results of Dr. Lombroso's observations.

"The study of the living, in short, confirms, although less exactly and less constantly, this frequency of micro-cephalies, of asymmetries, of oblique orbits, of prognothisms, of frontal sinuses developed as the anatomical table has shown us. It shews new analogies between the insane, savages and criminals The prognathism, the hair abundant, black and frizzled, the sparse beard, the skin very often brown, the oxycephaly, the oblique eyes; the small skull, the developed jaws and zygomas, the retreating forehead, the voluminous ears; the analogy between the two sexes, a greater reach, are new characteristics added to the characteristics observed in the dead which bring the European criminals nearer to the Australian and the Mongolian type." The observations of Dr. Lombroso are corroborated by the researches of Professor Ferri, Marro and others. Thus, according to Professor Ferri the enormous development of the jaw is the most "characteristic mark of homicides committed through antihu man fury" (*o*).

Corroborated by Ferri.

I have had some opportunities of observing some murderers and violent criminals (the former of whom were under-trial prisoners, it should be noted, but almost all of whom were convicted afterwards) in some of the important prisons of Bengal, Behar and Rajputana and I have noticed that the development of the jaws, and retreating foreheads are the most frequent, if not the invariable, characteristics of those criminals. The same anatomical features will also be noticed in the photographs of criminals reproduced by Mr. F. C. Daly, C.I.E., in his "Manual of Criminal Classes operating in Bengal," in the photographs of notorious criminals prepared and kept by the Police Department of Bengal, and also in the Bengal Criminal Intelligence Gazette. Observations like these surely justify us in concluding that there are certain well-defined physical and anatomical characteristics which would mark off what is known as the 'criminal type' (*p*). It must

Certain well-defined physical and anatomical characteristics of the criminal type.

(*o*) Criminal Sociology, p. 75.

(*p*) The objections based upon the facts that the number of criminals examined are not large enough and that the characteristics observed are not invariable will be discussed in another connection.

the will " (k). It really seems as if Tarde and Salilles, (l) experimental criminologists as they proclaim themselves to be, still adhere to that fetish of moral liberty as a matter of concession to popular feelings and opinions. The fallacy of Tarde's argument, it may be noted further, is apparent on the face of it. He does not deny that " surrounding influences and external circumstances " have an important effect upon criminality and he elsewhere asserts that the individual is " the point of inter-section " of these influences and circumstances. It is not possible to ascertain mathematically, what part the influences and circumstances play and what part this mysterious entity the " individual " plays in the formation of a voluntary act. Now, if it is admitted that the environment has an influence upon the voluntary act, it must follow that the environment must influence the human will first before it can produce the voluntary act. That being so, it is easy to conclude that the human will itself is shaped and moulded by its environment (m) and the ordinary laws of nature. No one can deny the existence of human will any more than one can deny the existence of human intellect but what is denied is that this human will is outside the scope of natural laws and can, like an autocrat, promulgate its absolute decrees or ukases unfettered by any law. Human will, we conclude therefore, is an ordinary cosmic phenomenon—a product of evolution and can cause a voluntary act exactly in the same way in which one phenomenon may be said to cause another.

Fallacy of Tardes' position.

Meaning of the negation of the freedom of will.

The second branch of this argument is, as I have observed above, that it is not possible to delineate the biological and psychological characteristics of the delinquents since they do not form a class by themselves and they are exactly like the other ordinary human beings The discussion about the existence of what is known as the " criminal type " (n) is too important to be thus summarily disposed of and it must be treated in fuller details hereafter. I pro-

The second branch of argument of the classical school considered.

(k) Criminal Sociology, p 290.

(l) But Salilles, it should be noted, is not out and out an advocate of freewill. According to him, a man is *potentially* free, but actually his power of will is dependent upon such conditions as his state of health or the presence of a pathological factor, etc. This is very much like the view I have advocated here. See ' Individualisation of Punishment ' Chapter IV.

(m) By ' Environment ' I mean not only the physical and the social factors but biological and psychological factors as well.

(n) The most recent investigations on the subject are those of Dr. Charles Goring in his " The English Convict." His opinion appears to be that criminals differ from other men not specifically but selectively ; some of the qualities of the average man are in them more or less exaggerated.

criminality are pre-eminently affairs of the individual, and this, notwithstanding the range of surrounding influences and external circumstances, for it is truer that the individual utilizes these than that he is moulded by them" (h). The metaphysical fallacy of a "theory of indetermination" has been pointed out by John Stuart Mill, Green and others (*i*) and I do not feel called upon to enter into a philosophical disquisition on the subject. All that I want to point out is that the theory of the freedom of will, will militate against the law of causality upon which the entire fabrics of physical, psychical and sociological sciences depend. Generalisations of a science, as we know, depend upon the nexus of causality that may be established between phenomena and if we introduce anything extraneous and inexplicable in the shape of the fiat of human will—the entire causal chain will lose its meaning and no generalisation and hence no science would be possible. It will be further observed that no scientific reason (except perhaps that based upon the dubious evidence of one's own consciousness) has ever been assigned for the existence of this inscrutable freedom of the human will, while on the other hand, the science of physio-psychology (or psycho-physics), uniting external observation with introspection has demonstrated the natural process in accordance with which every voluntary act of man is unrolled. Thus as it has been well observed that "from a reaction of irritability in the most elementary animal form, the protozoa, for example, up to the highest extremity namely the deliberate act of a human being, there is a continuous series of shades and degrees which do not admit of a special privilege in humanity by the intervention of moral liberty, which would be a miraculous exception in the entire order of universal activity" (j) Indeed, as Professor Ferri has briefly put it—"this feeling of freedom to will one thing rather than another is a pure illusion arising from the fact that we have no consciousness of the immediate antecedents, whether physiological or psychic, of the deliberation which precedes

Objections to the "Theory of indetermination."

(*i*) militates against the law of causality.

(*ii*) based upon the dubious evidence of one's own consciousness.

(*iii*) evidence of psycho-physics.

(*iv*) Feeling of freedom due to the fact that we are not conscious of the intermediate processes.

(*h*) Tarde's introduction to Salilles' 'Individualisation of Punishment.'

(*i*) See Bradley's 'Ethical Studies'—"Philosophy of Responsibility." It is interesting to note how Hegel attempted to explain the doctrine of freewill in relation to criminality by saying that the freewill of a person asserting itself leads to three results one of which is "unrecht" *i.e.*, non-right or transgression—*i.e.*, a crime. Non-right or crime is the will of the person revolting against itself to the extent that it is will in itself and for itself. Hegel's 'Philosophy of Right.' tr. by Dyde. p. 76.

(*j*) The literature on this subject is vast, but the most well-known works are those of Schneider Verworn and others.